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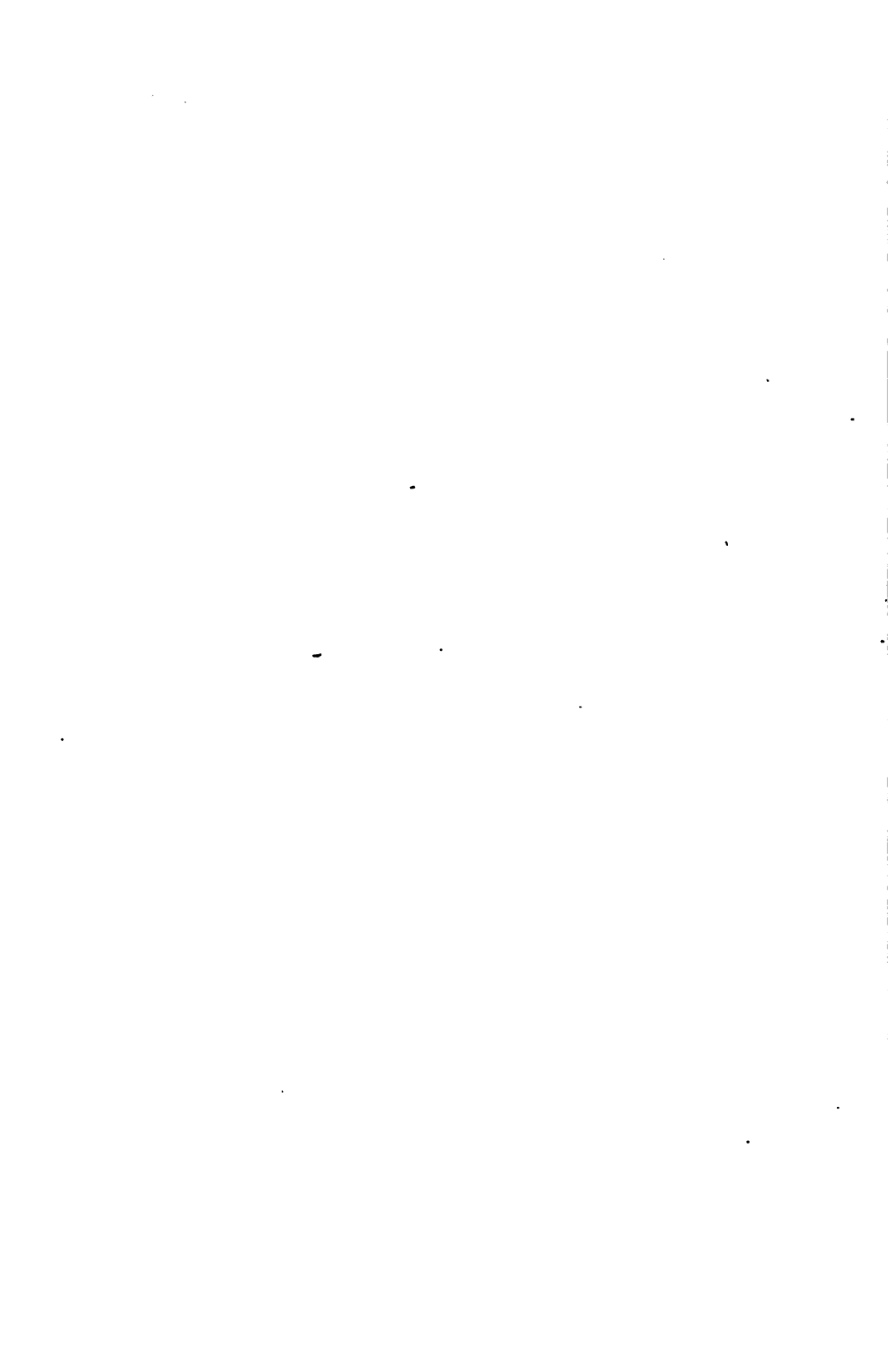
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REPORTS

OF

CASES AT LAW AND IN EQUITY

DETERMINED BY THE

SUPREME COURT

OF THE

STATE OF IOWA.

ERRATUM.

Substitute for the word "Idem" at end of point
16, on page 766, Vol. 102, *State v. Millmeir*, 692.

BY
BENJ. I. SALINGER.

VOLUME XVI,
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JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

H. E. DEEMER, RED OAK, *Chief Justice*

GIFFORD S. ROBINSON, SIOUX CITY.

CHAS. T. GRANGER, WAUKON.

JOSIAH GIVEN, DES MOINES.

SCOTT M. LADD, SHELDON.

CHARLES M. WATERMAN, DAVENPORT.

OFFICERS OF THE COURT.

MILTON REMLEY, IOWA CITY, *Attorney General*.

C. T. JONES, WASHINGTON, *Clerk*.

BENJ. I. SALINGER, CARROLL, *Reporter*.

JUDGES OF THE COURTS

FROM WHICH APPEALS MAY BE TAKEN TO THE SUPREME COURT.

DISTRICT COURTS.

First District—HENRY BANK, JR., Keokuk.

Second District—M. A. ROBERTS, Ottumwa; T. M. FEE, Centerville;
F. W. EICHELBERGER, Bloomfield; ROBERT SLOAN, Keosauqua.

Third District—H. M. TOWNER, Corning; W. H. TEDFORD, Corydon.

Fourth District—WM. HUTCHINSON, Orange City; GRO. W. WAKE-
FIELD, Sioux City; F. R. GAYNOR, Le Mars; JOHN F. OLIVER,
Oswawa.

Fifth District—J. H. APPLGATE, Guthrie Center; J. H. HENDERSON,
Indianola; A. W. WILKINSON, Winterset; JAMES D. GAMBLE,
Knoxville.

Sixth District—DAVID RYAN, Newton; BEN MCCOY, Oskaloosa; A. R.
DEWEY, Washington.

Seventh District—JAMES W. BOLLINGER, Davenport; W. F. BRANNAN,
Muscatine; P. B. WOLFE, Clinton; A. J. HOUSE, Maquoketa.

Eighth District—MARTIN J. WADE, Iowa City.

Ninth District—W. F. CONRAD, CALVIN P. HOLMES, THOMAS F.
STEVENSON, CHARLES A. BISHOP, Des Moines.

Tenth District—FRANK C. PLATT, Waterloo; A. S. BLAIR, Man-
chester.

Eleventh District—D. R. HINDMAN, Boone; S. M. WEAVER, Iowa
Falls; BENJAMIN P. BIRDSALL, Clarion.

Twelfth District—JOHN C. SHERWIN, Mason City; J. F. CLYDE, Osage,
C. H. KELLEY, Forest City.

Thirteenth District—L. E. FELLOWS, Lansing; A. N. HOBSON, West
Union.

Fourteenth District—LOT THOMAS, Storm Lake; WILLIAM B. QUAR-
TON, Algona.

Fifteenth District—A. B. THORNELL, Sidney; WALTER I. SMITH,
Council Bluffs; N. W. MACY, Harlan; W. R. GREEN, Audubon.

Sixteenth District—S. M. ELWOOD, Sac City; Z. A. CHURCH, Jeffer-
son.

Seventeenth District—GEORGE W. BURNHAM, Vinton; OBED CASWELL,
Marshalltown.

Eighteenth District—H. M. REMLEY, Adamosa; WILLIAM G. THOMP-
SON, Marion.

Nineteenth District—FRED O'DONNELL, Dubuque; JAMES L. HUSTED,
Dubuque.

Twentieth District—JAMES D. SMYTH, Burlington; WINFIELD S. WITH-
ROW, Mt. Pleasant.

SUPERIOR COURTS.

Cedar Rapids—THOMAS M. GIBERSON.

Council Bluffs—J. E. F. MCGEE.

Keokuk—RICE H. BELL.

IN MEMORIAM.

JAMES G. DAY.

On the first day of May, 1898, James G. Day, who was at one time a justice of this court and its chief justice, and later a leading member of the Polk county bar, departed this life at his home in Des Moines.

On May 25, 1898, Hon. C. C. Cole, of said bar, presented in the supreme court resolutions adopted by that bar upon the death of Judge Day, and then proceeded to address the court as follows:

MAY IT PLEASE THE COURT:

Pursuant to the request of the Polk County Bar Association, as well as in response to the promptings of my own heart, I appear for the purpose of presenting to this Honorable Court, the resolutions which have been furnished me by the bar association, in respect of the death of the Honorable James G. Day, for many years a member of this court, and to ask that the resolutions be spread upon the records of this court, and that the reporter be instructed to insert the same with these proceedings in the forthcoming volume of the reports of the decisions of this court. I read:

"WHEREAS, death has removed from our midst one of the most honorable and able of our profession, Judge James G. Day.

"Therefore, *Resolved by the Polk County Bar Association*, that the following memorial and resolutions be presented by a committee of this body to the supreme court of the state, the United States circuit court for the southern district of Iowa, and the district court of Polk county, with the request that the same be spread upon the records of said several courts:

"James G. Day was born in Jefferson county, Ohio, June 28, 1832; graduated in Cincinnati Law School in the year 1857, and was admitted to the practice of law at Afton, in Union county, Iowa, in the same year,

where he continued in the practice until the fall of 1861, when he volunteered in the military service of the United States, became a member of company F, of Fifteenth Iowa infantry, and was commissioned as a lieutenant of said company. He was wounded at the battle of Shiloh, April 6, 1862, and was compelled, by reason thereof, to resign his commission in September of that year. He was nominated and elected judge of the district court of the then third judicial district of the state of Iowa in the fall of 1862, and filled that office with ability until 1870, when he was appointed to fill a vacancy upon the supreme bench of the state of Iowa, to which position of a judge of the supreme court of the state he was elected in the fall of 1870 and continued to fill that high office until January 1, 1884. Upon retiring from the bench of the supreme court, he became a member of the Polk county bar, and continued to practice his profession as a member of the bar until the time of his death, May 1, 1898.

"In view of his eminent services to the state as a jurist, his high character as a citizen, and his ability and integrity as a lawyer, we, the members of the bar of Polk county, Iowa, in testimony of the high appreciation in which he was held by his brethren of the bar and by the people of the state, do, therefore, resolve:

"That we recognize the ability and integrity with which Judge James G. Day discharged his duty in every relation in life. That his private character was without blemish; that his official career was honorable and distinguished by learning, ability and integrity; that his professional courtesy and fidelity and his generous bearing toward his brethren of the profession, endeared his memory to us all.

"*Resolved*, that a copy hereof be transmitted to the members of the family of the deceased, and furnished the city press for publication."

May it please your honors: Judge Day was so magnificently developed and well rounded, physically, mentally and morally, that, while it is a pleasure to contemplate his person and character, it is nevertheless exceedingly difficult to fairly and properly present it upon an occasion like this. Some men have such marked characteristics as compel attention and require discussion from any biographer or eulogist. But Judge Day's completeness of constitution and development seem to preclude the selection of any one feature of that complete character for discussion or presentation above every other. I think, however, I may safely affirm that in the respect of promptness in obedience to the monitions of his conscience he excelled every other man with whom I was ever associated. This was so often manifested at the consultation board, when reading and discussing opinions prepared, pursuant to direction, after a previous full consultation respecting a case, that it made a fixed and indelible impression upon my mind. With the balance of us, when a criticism was made upon the prepared opinion, as being more or less in antagonism to language used in some reported case, we were ready at once to maintain the correctness of the opinions, severally prepared by us; but when a similar criticism was

made upon an opinion read by Judge Day, he promptly conceded that it was possible the criticism was correct, and would ask to withdraw the opinion until he could personally investigate the merits of the criticism. After such investigation, he would return with it, as often confessing its justness, and making the correction, quite as often as he returned with it, announcing his adherence to the opinion as originally prepared. In many other respects, the same prompt obedience to conscience was ever manifest. When, however, by investigation, he became convinced, or confirmed in the correctness of his view and expression, his adherence was equally a matter of conscience, and from which his associates were powerless to move him.

While it may, perhaps, be true that Judge Day was not especially or markedly profound, nor yet astute to a very high degree, still he was always reliable and especially helpful in consultation. His views were always well balanced, and always characterized, even to an unusual degree, with weighty and common sense judgment. He never pursued any question beyond the point of practical common sense consideration. He was a logician and fully believed that logic, correctly followed, leads to the development of truth. When reaching such conclusions by logic, which appeared to him faultless, he accepted the result as a verity, and confidently rested his judgment thereon. And yet, Judge Day was never unmindful of the fact that the purpose of law was the attainment of justice, and never failed to give just consideration to all claims of equity lying in his pathway to the goal of justice.

Judge Day's personal and judicial integrity were ever recognized and never questioned. The personnel or bearing in any case, never could diverge him one iota from the line of duty or the goal to be reached. This strict adherence to the right, as he saw it, regardless of consequences to himself, has a strong illustration and unquestioned verification in the final opinion prepared by him in the case involving the validity of the prohibitory amendment to the constitution. I hazard nothing when I affirm that there was not, within the boundaries of the state, a man more conscientiously devoted to the cause of prohibition, or whose habits of life were more completely within its limitations, than Judge Day. No man did or could more devoutly desire the engrafting upon our constitution the absolute prohibition of the sale of intoxicants than he. He talked, he used his influence and voted for the amendment. Its adoption and enforcement were among the cherished wishes of his life. Yet, as chief justice of this court, he prepared and delivered its final opinion, declaring the constitutional amendment invalid. That decision never had the approval of my personal legal judgment, and yet, its announcement by Chief Justice Day, under all the circumstances, is to me, and I think by the general acceptance of the public, is regarded as absolutely conclusive proof of his unswerving integrity and fidelity to duty, regardless of consequences to himself. That decision, notwithstanding its purity of purpose and perfect integrity in its announcement, nevertheless brought to Judge Day the largest, if not the only cloud in the horizon of his entire life, because of

the partisan view taken of it by many of his friends and fellow citizens. It was his conscientious integrity respecting it, and the consequent absolute knowledge of the injustice of all adverse criticism, that created the cloud, which in silent submission, he viewed during the remainder of his life. He came to know, during his life, some measure of justice to him in the exoneration he received from the adverse criticism, which has now, though unknown to him, become perfect and complete.

It was in his private and domestic life that his character and worth were ever seen and appreciated. It is said of the matchless English statesman, who has so recently passed away, the now immortal Gladstone, that his happiness and greatness were largely because of his fortunate marriage. Having had more than twenty-five years of social intimacy with Judge Day and his family, I am prepared to affirm that Judge Day's happiness and usefulness were greatly augmented by his fortunate marriage. In a large field of acquaintances, now extending in time, to substantially fifty years of married life, with large, if not unlimited opportunities of observation and knowledge, I do not hesitate to declare that I have not met a husband and wife with such measureless confidence, unlimited respect and perennial affection for each other, as were possessed and manifested with them. Not only so, but while the duties of husband and wife are not identical, nor always in absolutely parallel lines, yet, with them, each rendered to the other, in every special duty cast upon them the fullest aid in his or her power. It was this reciprocal aid which gave to Judge Day's wife such marked recognition for ability and beneficence in the avenues of her life work, and which awarded to Judge Day such great praise in his special, and, indeed, in his professional work. It was doubtless the excessive work and overtaxing the energies of the wife in the avenues of christian and benevolent enterprises which brought Mrs. Day to her premature close of life, and the peculiar and intensified relations to which I have referred as existing between him and her, contributed largely to, if it did not wholly and alone, bring him to his death.

I need not refer further nor particularly to the attainments in Judge Day's life. It is sufficient to say that he was chosen judge by the voice of the people among whom he had lived for years; he judged them well and acceptably; even so well and acceptably as that he was, by common consent, invited to the supreme bench, a larger field of usefulness, where he contributed so much to the laying, both wisely and well, the foundations of the jurisprudence of one of the leading commonwealths of this great nation. The coming biographer will find in his recorded opinions abundant theme for the future eulogy of James Gamble Day.

And it was thereupon ordered that said resolutions and address be entered of record in this court.

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AT
DES MOINES, JANUARY TERM, A. D. 1898,
AND IN THE FIFTY-SECOND YEAR OF THE STATE.

R. I. PEATMAN V. THE CENTERVILLE LIGHT, HEAT AND
POWER COMPANY, *et al.*, Appellants.*

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105	651
105	1
107	574
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115	885

Mechanic's Lien: ASSIGNMENT: *Subsequent incumbrances.* An assignee of a claim for labor and materials furnished in the construction of a house, is entitled to a mechanic's lien therefor, as against persons other than subsequent purchasers or incumbrancers in good faith, although the lien has not been perfected by filing a statement prior to the assignment, under Acts Sixteenth General Assembly, chapter 100, section 6, providing that every person who wishes to avail himself of the provisions of the

1 statute shall file a verified statement of the demand due him, and that such statement must be filed by a principal contractor within ninety days, and by a sub-contractor within thirty days, but that a failure to file the same within the periods mentioned shall not defeat the lien except against purchasers or incumbrancers in good faith.

*The figures on the left of the syllabi refer to corresponding figures placed on the margin of the case at the place where the point of the syllabus is decided.

SAME. A judgment creditor whose judgment is rendered nearly a year after the statement of a mechanic's lien is filed on the premises of the judgment debtor, is not a subsequent incumbrancer in good faith within Acts Sixteenth General Assembly, chapter 100, section 6, requiring every person claiming a mechanic's lien to file
 1 a verified statement of the demand due him within a specified time, and providing that a failure to file the same within such time shall not defeat the lien except as against purchasers or incumbrancers in good faith, without notice, whose rights accrued after the expiration of the time specified and before any claim for the lien was filed.

WHO ENTITLED TO. A lien may be acquired for the labor of a man who operates a gas plant for thirty days and tests the machinery
 2 and causes it to meet the requirements of the guaranty given, under the statute providing that a lien may be acquired by any person who shall do any labor upon any building or make any other improvement upon land.

SAME. A contractor for the erection of a gas plant is not entitled to
 2 a lien for services rendered in instructing the superintendent.

SAME. A mechanic's lien cannot be acquired by a contractor for the
 2 erection of a gas plant, for the assignment of patent rights which are not included in the use of the appliances which the contractor was required to furnish.

ASSIGNMENT: Waiver. Though Acts Sixteenth General Assembly, chapter 100, section 13, provides that mechanics' liens are assignable, and follow the assignment of the debt, a person entitled to
 1 such a lien may waive it, and may also assign the debt without the lien.

BLENDING ACCOUNTS. Where in a mechanic's lien account, the value
 3 of items for which the law gave no lien was not stated, and they were blended with lienable items, the entire lien is defeated.

Appeal from Appanoose District Court.—HON. T. M. FEE, Judge.

WEDNESDAY, APRIL 6, 1898.

ACTION in equity to recover an amount alleged to be due, and to establish and enforce a mechanic's lien. There was a hearing on the merits, and a decree for the plaintiff. The defendants appeal.—*Reversed.*

Baker & Moore, for appellants.

Valentine & Valentine, for appellee.

ROBINSON, J.—In November, 1893, the defendant the Centerville Light, Heat & Power Company was engaged at Centerville in manufacturing water gas by what was known as the "Loomis Process." The gas so manufactured was not satisfactory, and one Joseph Askins submitted to the company a proposition in writing to so change and add to its appliances for making gas as to convert the system from the Loomis to the Askins process. The proposition included a guaranty as to daily capacity, and the quality and quantity of gas which should be made from a specified quantity of hard coal, or hard coke and crude oil, and also included the following: "I further agree to furnish a man to operate the plant for thirty days for the purpose of testing the efficiency of the plant and to instruct the superintendent in its operations, and at the end of thirty days, if the plant has proved to carry out my guarantee, the plant is then to be accepted. * * * I further agree to assign to the Centerville Light, Heat & Power Company the exclusive use of all my patents pertaining to the manufacture of gas in and to the city or town of Centerville, Iowa." In consideration of what was to be furnished and done by Askins, the company was to pay him one thousand dollars when the plant should be accepted, and give its two promissory notes for seven hundred dollars each, one of which was to be payable in six months and the other in one year. The proposition was accepted, and Askins performed his part of the agreement thus made. After that had been done, the two notes provided for in the contract were delivered to Askins, but the payment of the one thousand dollars was not made. Askins prepared and verified a statement for a mechanic's lien upon the property improved,

for the sum of two thousand, four hundred dollars. The statement was verified on the nineteenth day of January, 1894, but was not filed with the clerk of the district court of Appanoose county until the thirtieth day of October of the same year. On the day of its date, however, Askins, for the sum of one thousand dollars, transferred his claim for a lien by an indorsement on the statement, in form as follows: "For value received, I hereby assign the within mechanic's lien to R. I. Peatman, and authorize him to cancel the same when paid. January 19, 1894. Joseph Askins." This action is brought to recover of the company one thousand dollars, with interest, and to establish therefor a mechanic's lien. The defendant D. C. Campbell was the owner of a judgment against his co-defendant, the company, for twenty-one thousand, three hundred and ninety-eight dollars and sixty-two cents, besides attorney's fees and costs. An execution was issued for the satisfaction of the judgment, and the property in question was sold thereunder to Campbell. The district court rendered a decree in favor of the plaintiff for the amount he asked, and for a lien therefor, and adjudged the lien so established to be senior to that of Campbell. The defendants appeal from so much of the decree as establishes a mechanic's lien, and Campbell further appeals from that part of the decree which makes his lien inferior to that established in favor of the plaintiff.

I. The appellants contend that the plaintiff is not entitled to a mechanic's lien, because it had not been perfected by the filing of a statement, as required by law, when Askins transferred the claim in suit
1 to him. The right of the plaintiff to a lien is controlled by chapter 100 of the Acts of the Sixteenth General Assembly. Section 6 of that act contains the following: "Every person, whether contractor or sub-contractor, who wishes to avail himself of the

provisions of this statute, shall file with the clerk of the district court of the county in which the building, erection, or other improvement to be charged with the lien is situated, a just and true statement or account of the demand due him * * * and verified by affidavit. Such verified statement or account must be filed by a principal contractor, within ninety days, and by a subcontractor within thirty days from the date on which the last of the material shall have been furnished, or the last of the labor was performed. But a failure or omission to file the same within the periods last aforesaid, shall not defeat the lien, except against purchasers or incumbrancers in good faith without notice, whose rights accrued after the thirty or ninety days, as the case may be, and before any claim for the lien was filed." Mechanic's liens are assignable, and follow the assignment of the debt. *Idem*, section 13. But it is said that the filing of the statutory statement is essential to the creation of the lien, and that an assignment of the debt before the statement is filed will not transfer the lien. The statute does not, however, make the filing of the statement essential, under section 6, to the creation of a lien, but only to preserve it against purchasers or incumbrancers in good faith without notice, whose rights accrue after the expiration of the time fixed for filing the statement. *Lee v. Hoyt*, 101 Iowa, 101; *Lumber Co., v. Bownan*, 77 Iowa, 706; *Chicago Lumber Co. v. Des Moines Driving Park*, 97 Iowa, 25. Section 1851 of the Revision of 1860, as amended by chapter 111 of the Acts of the Regular Session of the Ninth General Assembly, contained a provision in regard to the filing of the statement to charge subsequent purchasers and incumbrancers, substantially like the one under consideration. That provision was considered in *Neilson, Benton & O'Donnel v. Iowa E. R. Co.*, 51 Iowa, 184, and held, in effect, not to require the

filing of the statement in order to perfect the lien as against the owner. The case of *Bissell v. Lewis*, 56 Iowa, 231, arose under the statute we are now considering, and it was there said: "It is quite clear it is not essential, to the establishment of the lien under consideration, that any lien statement should have been filed in the clerk's office." In our opinion, the filing of the statement was not essential to the existence of the lien in question. That was created by the furnishing of the labor and material, as provided in the contract, and Askins was entitled to a lien before he assigned the debt upon which this action is founded. Therefore, the assignment of the debt and the indorsement upon the statement for a lien had the effect to transfer the lien to the plaintiff. The statement was prepared and verified by Askins, and by him delivered to his agent for filing, but for some unexplained reason was not filed until the last of October, as stated. Campbell is not a subsequent incumbrancer in good faith, for the reason that the judgment through which he claims was not rendered until the seventeenth of September, 1895, nearly a year after the statement was filed.

It is said, however, that this court has decided that, until the statement for a lien is filed, the lien is not so far completed as to be assignable, and language was used in the opinion in *Merchant v. Water Power Co.*, 54 Iowa, 451, which affords some ground for that claim. But a careful examination of the case shows that the language of that character used was not essential to the decision of the questions presented. It appears that in that case an order was issued by the owner to the contractors in November, 1875, in part payment of the contract price, before the contract was completed, and before the contractor had become entitled to a lien. In April, 1876, the order was assigned to Merchant, but the contract was not completed until

January, 1877. It does not appear that the contractors ever claimed a lien, or that they attempted to assign any interest in one. Merchant recovered judgment on the order against the owner, in February, 1877. Ten months later he filed a statement for a lien and then commenced an action to enforce the lien claimed, as against an incumbrancer whose rights accrued December 1, 1876. It is clear, under the facts stated, that the parties to the assignment of the order did not intend to transfer any interest in a mechanic's lien by the assignment, and that the case was rightly decided, but it cannot be regarded as an authority in this case. It should also be observed that the court expressly stated that the provision of chapter 100 of the Acts of the Sixteenth General Assembly, which makes the lien follow the assignment of the debt, was not in force when the assignment there in question was made. The case of *Brown v. Smith*, 55 Iowa, 31, involved the right of the assignee of a time check to file a statement for, and to enforce, a mechanic's lien. The time check was issued to an employe of a subcontractor, who, so far as is shown, did not claim a lien. The facts are unlike those involved in this case. The opinion is brief, and is made to depend in part upon the case of *Bank v. Day*, 52 Iowa, 680, which did not arise under the provisions of law in regard to the assignment of a lien which apply here, and also, in part, upon the *Merchant Case*. The case of *Laugan v. Sankey*, 55 Iowa, 52, is similar in principal to that of *Brown v. Smith*, and followed that and the *Merchant Case*. In each of the cases decided by this court upon which the appellant relies, the controlling facts and the statutory provisions involved were so unlike those which are material in this case that the cases cannot fairly be regarded as in conflict with the conclusion we reach in this case. Although the statute provides that "mechanics' liens are assignable, and

shall follow the assignment of the debt," yet a person entitled to such a lien may waive it, and may also assign the debt without the lien. But in this case the parties to the assignment intended to preserve the lien, and to assign it with the debt, and what they did for that purpose would have been effectual, had the assignor been entitled to a lien. This conclusion is required by the plain provisions of the statute, as applied to the facts of this case, and by the cases of *Neilson, Benton & O'Donnel v. Iowa E. R. Co.*, and *Bissell v. Lewis, supra*. We do not find it necessary to determine whether, in case the filing of a statement is required to preserve the lien, as against other persons than the owner, the statement may be prepared and filed by the assignee.

II. It is claimed that the plaintiff is not entitled to a lien for his claim, because the contract on which it was based required Askins to furnish a man to operate the plant for thirty days, and to assign
2 to the company the exclusive use of certain patents, and that a lien for such items cannot be allowed. A mechanic's lien may be acquired by any mechanic or other person "who shall do any labor upon, or furnish any materials, machinery, or fixtures, for any building, erection or other improvement upon land. * * *" Under this provision a lien could have been obtained for the labor of a man to operate the plant for thirty days, in order to test the machinery and cause it to meet the requirements of the guaranty; but the contractor was not entitled to a lien for services rendered to instruct the superintendent, nor for the assignment of patent rights which were not included in the use of the appliances which the contractor was required to furnish. The contract required the payment of the sum of two thousand, four hundred dollars for the labor and appliances

furnished, and also for the instruction given the superintendent, and the right to use the patents described. That right is not shown to be included in the right to use the appliances furnished. It must be presumed that the instruction given, and the right to use the patents, which were to be assigned, were of substantial value; but we are without means of ascertaining what it was, and therefore cannot determine the amount for which a lien might properly be established. . The effect of this is to prevent the establishment of a lien for any part of the plaintiff's claim. See *Morrison v. Minot*, 5 Allen, 403; *McMaster v. Merrick*, 41 Mich. 503, (2 N. W. Rep. 895); *Dennis v. Smith*, 38 Minn. 494 (38 N. W. Rep. 695). We conclude that the district court erred in establishing a lien in favor of the plaintiff, and its decree is REVERSED.

IN THE MATTER OF THE ESTATE OF THOMAS H. MCGHEE,
Deceased, NATH. FRENCH, Administrator, Appel-
lant, v. THE STATE OF IOWA.

Collateral Inheritance Tax. The collateral inheritance tax law (Acts Twenty-sixth General Assembly, chapter 28, section 1) provides that all property in the state which shall pass to any person other than persons exempted, shall be subject to a tax of five per cent. of its value above the sum of one thousand dollars. Other parts of the act provide that the tax is only payable on account of the property of an estate in excess of one thousand dollars, which remains "after the payment of all its debts." *Held*, that the word "person," in section 1, though importing the singular, should be extended to include the plural; that the debts referred to are the debts of the estate and not of the collateral heirs; and that therefore the one thousand dollars exemption should be taken from the aggregate amount of the property which remained after the payment of the debts of the estate, and not from the share of each heir.

APPRAISEMENT. Acts Twenty-sixth General Assembly, chapter 28, section 1, relating to the collateral inheritance tax, provides that

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it shall be assessable on the "value" of the estate over and above one thousand dollars. In subsequent sections, terms relating to
2 the assignment are used, such as follows: "appraised value," "actual market value," and "value" without qualification. *Held*, that the assessment should be made upon the fair market value, and not the assessed value of the property fixed for the purposes of ordinary taxation.

SAME. Where the state is not a party to the appraisement of an estate for the assessment of a collateral inheritance tax due to it, and had no notice thereof when made, the district court may
8 order a second appraisement on the state's application, alleging an unfair appraisement.

WATERMAN, J., took no part.

Appeal from Scott District Court.—HON. P. B. WOLFE,
Judge.

WEDNESDAY, APRIL 6, 1898.

PROCEEDINGS in probate for the purpose of ascertaining the amount of a collateral inheritance tax. The district court approved an appraisement of property of the decedent, and directed the payment of the amount of inheritance tax fixed in the report of the appraisers. The administrator of the estate appeals.—*Affirmed*.

Nath. French for appellant.

Milton Remley, Attorney General, for the State.

ROBINSON J.—This proceeding arises under chapter 28 of the Acts of the Twenty-Sixth General Assembly, entitled "An act imposing a collateral inheritance tax and providing for the collection of the same." The material facts involved are as follows: In August, 1896, Thomas H. McGhee, a non-resident of this state, died intestate. Neither wife, parent, nor any lineal descendant, adopted child, nor lineal descendant of an adopted child, survived him, and his only heirs are twenty-five children and grandchildren of his four

deceased sisters. He left both real and personal property in this state, and on the last day of August, 1896, Nath. French was appointed administrator of his property within this state. In March, 1897, the administrator commenced this proceeding, in which he asked for the appointment of three appraisers to value and appraise the property of the decedent within this state, for the purpose of ascertaining the amount of inheritance tax due on the property. Appraisers were accordingly appointed, who thereafter filed a report which contained a list of the property which belonged to the estate and fixed its "assessed value" at twenty-two thousand, five hundred and thirty-five dollars, and stated that the appraisers were uncertain whether each heir was entitled to an exemption of one thousand dollars, or whether that exemption was only from the total assessed value. The court approved the appraisement, and found that each heir was entitled to an exemption of one thousand dollars, and thereupon ordered that the administrator pay the collateral tax on the amount of the shares of each heir in excess of one thousand dollars. Thereafter the state filed an application to have the appraisement and order of the court based thereon set aside, and as grounds therefor stated that the proceedings had been without notice to the state, and that it had not had an opportunity to appear at the time the order of the court was made, that the appraisement was much below the actual value of the property, and that the court erred in computing the tax due from the estate, to the prejudice of the state. The application of the state was sustained, and the appraisers were directed to appraise all the property of the estate at a fair market value; and it was also ordered that from the valuation thus ascertained the debts, costs, and the expenses of the administration, and the sum of one thousand dollars, exempt by statute,

be deducted, and that the remainder be assessed with the collateral inheritance tax. A new appraisement was made as directed, and the property was appraised at the sum of sixty-two thousand, five hundred and eighty dollars. After deducting the expense of administration, and one thousand dollars in addition, fifty-eight thousand dollars, subject to the statutory tax, were found to remain. The valuation and report of the appraisers were approved, and the payment of the inheritance tax on the amount last named was directed. The administrator appeals from the order setting aside the first appraisement, and directing a new one, and from the approval of the second appraisement, and second order directing the payment of the tax.

I. Section 1 of the act of the general assembly to which we have referred is as follows. "All property within the jurisdiction of the state, and any interest therein, whether belonging to the inhabitants of this state or not, and whether tangible or intangible, which shall pass by will or by the intestate laws of this or any other state, or by deed, grant, sale, or gift made or intended to take effect in possession or in enjoyment after death of the grantor, or donor, to any person in trust or otherwise, other than to or for the use of the father, mother, husband, wife, lineal descendant, adopted child, the lineal descendant of an adopted child of a descendant, or to or for charitable, educational, or religious societies or institutions within this state, shall be subject to a tax of five per centum of its value, above the sum of one thousand dollars, after the payment of all debts, for the use of the state; and all administrators, executors, and trustees, and such grantee under a conveyance, and any such donee under a gift, made during the grantor's or donor's life, shall be respectively liable for all such taxes to be paid by them respectively, except as

herein otherwise provided, with lawful interest as hereinafter set forth, until the same shall have been paid. The tax aforesaid shall be and remain a lien on such estate from the death of the decedent until paid." It is contended by the appellant, and conceded by the state, that the tax for which this statute provides is not a tax upon property, as that phrase is ordinarily understood, but a tax upon the succession,—upon the privilege of succeeding to the estate of the decedent,—and for the

purposes of this case that will be assumed to
1 be true. We next inquire whether, in ascertaining the amount of property subject to tax, the one thousand dollars exempt therefrom is to be deducted only from the aggregate amount of the property which remains after the payment of debts of the estate, or whether only so much of the share of each heir as exceeds the sum of one thousand dollars is subject to the tax. The appellant contends for the latter interpretation, and urges that the other was not intended by the general assembly, and would be unreasonable and unfair in its practical effects. The language, "All property within the jurisdiction of this state * * * which shall pass * * * to any person * * * [other than the person exempted] shall be subject to a tax of five per centum of its value, above the sum of one thousand dollars," taken alone, would tend to support the interpretation for which the appellant contends, but, to ascertain the legislative intent, all relevant parts of the act must be considered. It is the rule that "words importing the singular number may be extended to include several persons or things." Code 1873, section 45, subdivision 3. Hence the statutory phrase "to any person" does not necessarily mean one person only, but will include more than one, when that is required to give the statute the effect it was intended to have. The administrator, executor, or trustee

charged with the duty of settling the estate is liable for the payment of the tax, excepting that in some cases he is required to collect the tax from the person who is to receive the property, and to do certain things provided by statute to secure a lien for the tax upon property subject to it. But the tax is only payable on account of the property of an estate in excess of one thousand dollars which remains "after the payment of all its debts." To whose debts does the statute refer? The officer charged with the duty of settling the estate cannot have official knowledge of the debts of the collateral heir or other person to whom the property is to go, and there does not appear to be any good reason for granting to such a person, because he is in debt, an exemption, at the expense of the state, which is not granted to a person of the same class who is not in debt. It is evident that the debts to be paid are those which are claims against the estate of decedent, and we are of the opinion that both of the phrases, "above the sum of one thousand dollars" and "after the payment of all debts," have direct relation to the estate of the decedent. The legislative intent as to this may be expressed thus: "All property within the jurisdiction of this state, which shall pass by will or the intestate laws of this or any other state, or by deed, grant, sale or gift made, * * *" other than to or for the use of the persons specified, "shall be subject to a tax of five per centum of its value above the sum of one thousand dollars, after the payment of all its debts, for the use of the state." Other portions of the act tend to justify the interpretation we adopt, and we do not doubt that it expresses the legislative intent. It will, as nearly as is practicable, operate uniformly, where the conditions are the same, and thus produce equality in results. The case of *In re Howe*, 112 N. Y. 100 (19 N. E. Rep. 513), is relied upon in support of the interpretation for which the appellant

contends. But we must decline to follow that case, so far as it can be regarded as applicable to the statute under consideration.

II. The appraisalment which was set aside appears to have been according to the assessed value of the property fixed for the purposes of ordinary taxation,

2 while the second assessment represented its fair market value. It is claimed that the value contemplated by section 1 is not the fair market value, but the value assessed for the levying of ordinary taxes; and attention is called to the fact that the word "value," without qualification, is used in section 1, while the words "appraised value" are used in section 3, the "actual market value" is specified in section 4 and 5, and the word "value," without qualification, is also used in section 5. There is nothing in any part of the act to indicate that the general assembly intended to have the value of the property, as fixed by assessors and equalizing boards, considered for any purpose. The appraisalment is to be made by appraisers, and is subject to the approval of the court. When the word "value" is applied to property, and no qualification is expressed or implied, it means the price which the property will command in the market. 28 Am. & Eng. Enc. Law, 46. See, also, *Pool v. Hennessy*, 39 Iowa, 192. We are of the opinion that the different words used in the statute to designate the value of the property are intended to express substantially the same meaning, and that the value fixed should in all cases be the fair market value.

III. It is claimed the district court did not have power to order a second appraisalment. The state was not a party to the first appraisalment, and its interest in the proceedings was such that it was within the power of the court, on the application of the
3 state, and a showing of error in the proceedings theretofore had, to correct the error by means of a new appraisalment. We do not find any error in

the proceedings of the district court of which the appellant can complain and its judgment is **AFFIRMED**.

WATERMAN, J., takes no part.

B. F. DOUGHTY, Appellant, v. **HUGH H. MEEK, et al.**

Judgment: NUNC PRO TUNC. The entry of a judgment *nunc pro tunc*

1 is not authorized, merely, because the party had the right to a judgment at the time as of which the judgment is entered, but there must have been an actual rendition of a judgment.

SAME. The filing with the clerk of a statement of confession of
2 judgment is a sufficient rendition of judgment to authorize the subsequent entry of judgment *nunc pro tunc*.

EXECUTION. An execution issued on a judgment which has never
3 been formally entered is supported by an entry thereof *nunc pro tunc*.

Garnishment: CREDIT ON JUDGMENT. The principal debtor is entitled to a credit on a judgment against him, of an amount admitted by a garnishee to be due, where it does not appear that the garnishee was ever released, and the principal debtor denies having received the amount of such indebtedness, although no case was ever docketed against the garnishee and no judgment rendered, and though it does not appear that he ever paid the amount of such indebtedness to the garnishing creditor.

Appeal from Van Buren District Court.—**HON. T. M. FEE**, Judge.

THURSDAY, APRIL 7, 1898.

Suit in equity to enjoin the sale of real estate under a general execution. Plaintiff claims that there was no valid judgment upon which an execution could issue, and that whatever claim defendants may have had has been paid. The trial court dismissed the petition, and plaintiff appeals. *Modified and Affirmed.*

Work & Lewis and *M. B. Davis*, for appellant.

Mitchell & Sloan, for appellees.

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DEEMER C. J.—On the twentieth day of December, 1876, appellant made and executed a confession of judgment in favor of appellee Meek upon a note for the sum of two hundred dollars, executed in January, 1876. This confession was filed with the clerk of the district court in and for Van Buren county on or about January 1, 1877, but no entry of judgment was made upon the court records until the trial of this case, at which time the court ordered an entry of judgment as of the first regular term in the year 1877. On the twenty-first day of July, 1896, an execution issued from the office of the clerk of the district court upon a pretended judgment in favor of Meek and against Doughty, directed to the sheriff of Woodbury county. This execution was levied upon certain real estate in Woodbury county belonging to Doughty. This suit is to enjoin and restrain the sale of the real estate so levied upon. The trial court was evidently of opinion that no judgment had been rendered upon the statement of confession at the time the execution issued, but it ordered the rendition of judgment *nunc pro tunc*, and held that this validated the writ, and that plaintiff's petition should be dismissed. In support of the ruling it is contended that the filing of the statement of confession was in fact the rendition of a judgment, that the act of the clerk and the court with reference thereto was purely ministerial, that the court was justified in directing a *nunc pro tunc* entry of judgment, and that such entry covered all defects in the issuance of the execution. The argument in support of this contention is to the effect that, when a statement of confession is filed, the law, in the absence of the judge, at once pronounces the judgment, and it becomes the duty of the clerk to make the entry forthwith; that his failure to do so may be cured at any time by a *nunc pro tunc* entry;

and that such entry, when so made, validates all prior proceedings, including the issuance of execution.

1 That courts possess the power to enter judgments *nunc pro tunc* is conceded, but the exercise of such power presupposes the actual rendition of a judgment. The right to a judgment will not furnish the basis for such an entry. *Gray v. Brignardello*, 1 Wall. 627; *Worley v. Shong*, 35 Neb. 311 (53 N. W. Rep. 72); *Cassidy v. Woodward*, 77 Iowa, 355; *Freeman, Judgment*, section 68.

The inquiry yet remains, what effect is to be given the statement of confession when it is filed with the clerk? This question is not a new one to this court. In the case of *Risser v. Martin*, 86 Iowa, 392, which involved the right of the court to enter a judgment *nunc pro tunc* upon a statement of confession, we said: "It is true the court made no order, * * * but the law operated in lieu of formal action by the court as a direc-

2 tion to the clerk to enter judgment. In legal effect, the rights of the parties were the same that they would have been had the court ordered the judgment to be entered. It is said that a judgment *nunc pro tunc* is always proper where a judgment has been ordered, but the clerk has failed or neglected to copy it into the record. * * * In this case the confession expressed the amount of the debt, and the law fixed the judgment to which the plaintiffs were entitled." The point now under consideration is conclusively determined by this statement of the law, and needs no further elucidation.

II. At the time the execution issued there was no formal entry of judgment, and it is argued that the *nunc pro tunc* entry did not validate the execution. It is well settled that "there can be no judgment until it is entered in the proper record of the court. It cannot exist in the memory of the officers of the court, nor in

memoranda entered upon books not intended to preserve the record of judgments." *Winter v. Coulthard*, 94 Iowa, 312; *Balm v. Nunn*, 63 Iowa, 642; *Case v. Plato*, 54 Iowa, 64. In one of these cases it is said that, "there being no valid existing judgment when the execution issued it is void. This declaration had no reference, however, to the effect that should be given a *nunc pro tunc* entry, and it is not to be regarded as conclusive of the point now under consideration. Mr. Freeman, in his work on Judgments, at section 67, says: "With the exception pointed out in the previous section [relating to the rights of third persons], a judgment entered *nunc pro tunc* must be everywhere received and enforced in the same manner and to the same extent as though entered at the proper time. * * * Though an execution may have issued * * * when there was nothing on the record to support it, yet the omission is one of evidence, and not of fact; and, the evidence being supplied in a proper manner, full force and effect will be given to the fact, as if the evidence had existed from the beginning." Mr. Black, in his treatise on Judgments, at section 136, announces practically the same doctrine. These statements are authorized by the following, among other, authorities: *Bush v. Bush*, 46 Ind. 70; *Tapley v. Goodsell*, 122 Mass. 176; *Parker v. Rugg*, 9 Gray, 209; *Graham v. Lynn*, 4 B. Mon. 17. Following this almost unbroken line of decisions, we are constrained to hold that the *nunc pro tunc* entry so operated, as to save the execution which had theretofore been issued.

III. Finally, it is insisted that the claim or judgment had been satisfied in whole or in part prior to the issuance of the execution, the enforcement of which is sought to be enjoined. In 1877 an execution issued, which was served by levying upon thirteen sacks of flour and forty bushels of oats, and by garnishing four

supposed debtors of Doughty. The sheriff's return discloses that the property was returned to Doughty, by order of Meek's attorney, upon condition that Doughty pay the costs. The return further shows that

4 Doughty paid the costs. Of the four garnishees all denied being indebted to Doughty save one, who admitted he owed eighteen dollars and forty-five cents. No case was ever docketed against this garnishee, no judgment rendered, and no showing that he ever paid the amount to Meek, or to any one for him. There is no record evidence, however, that the garnishee who admitted this indebtedness was ever discharged, and Doughty squarely denies that the garnishment was released, and denies having received the amount of this indebtedness from the garnishee. The amount admitted by this garnishee to be due was eighteen dollars and forty-five cents. As the levy by garnishment is admitted, and as there is no sufficient showing by appellee that this garnishee was released, the appellee should be charged with the amount admitted to be due, and the same should be credited upon the judgment as of date November 3, 1877. Claim is made that the note upon which the confession of judgment was based was intended simply as security for an indebtedness due from one Nelson to Meek, and that, after the confession was executed, Nelson paid the debt. It is sufficient to say that the evidence does not support this contention. The debt was Doughty's, and Nelson did not pay it. With the modification above suggested, the decree is affirmed. **MODIFIED AND AFFIRMED.**

J. W. STONE, by Attorney, v. W. F. CONRAD, District
Judge, and the BOARD OF COMMISSIONERS OF
INSANITY.

Courts: CRIMINAL PRACTICE: *Insanity.* The district court has jurisdiction to try the question of sanity of a person indicted for murder and order him to be confined in the insane department of the penitentiary, although an application by his father had been handed to the clerk of such court before the indictment was found, stating that he was insane, and asking that the commissioners of insanity investigate and take action in the case, where no action was taken by such commissioners until after the finding of the indictment and service of warrant—under Code, section 2279, providing that on a written application by any citizen stating that a person confined within any prison, within the county, charged with a crime, but not convicted thereof, nor on trial therefor, is insane, the commissioners shall cause such prisoner to be brought before them and direct his removal to one of the hospitals for the insane, if they find him to be insane, section 5540, providing, that if a defendant appears, in any stage of the trial of a criminal prosecution, and a reasonable doubt exists as to his sanity, further proceedings must be suspended and a trial had on that question, and section 225, providing, that the district court shall have “exclusive” jurisdiction of all criminal actions, except in cases where exclusive or concurrent jurisdiction is or may, thereafter be conferred upon some other “court or tribunal.”

THURSDAY, APRIL 7, 1898.

THERE was an application to this court by plaintiff for a writ of *certiorari* commanding the defendants to certify up certain proceedings on their part, of which complaint was made. The writ issued, return was made thereto, and it is upon this record we are required to pass.—*Dismissed.*

James A. Nugent for plaintiff.

James A. Howe for defendants.

WATERMAN, J.—The facts, as they appear in the returns made by the defendants, are neither many nor complicated. On the fifth day of January, 1898, the plaintiff, J. W. Stone, shot and killed one Frank Kahler, in the city of Des Moines. On the tenth of that month, the father of Stone, acting through an attorney, handed the clerk of the district court a written application, signed by himself, and duly verified, charging that said Stone was insane, and asking that the commissioners of insanity investigate and take action upon the case. Nothing further was done in the matter at this time. The next fact of consequence in order of transpiring, was the finding and return of two indictments against Stone, charging him, respectively, with the crime of murder in the first degree, and assault with intent to commit murder. These indictments were returned by the grand jury on January 11, 1898, and immediately thereafter, on said day, warrants were issued thereon, and service upon Stone. After this, the application to the commissioners of insanity was filed, and thereafter the board met, on the day last mentioned; and upon a suggestion of want of jurisdiction on its part, because of the fact that Stone was held under warrants issued on said indictments, nothing was done at this time in the matter. On January 12th the board again met to consider the case, and it was decided that, for want of jurisdiction, no action would be taken, and an order was so entered. On the same day, Stone was arraigned in the district court, and counsel appointed to defend him. It appearing that a reasonable doubt existed as to his sanity, a trial was had in said court, by jury (Hon. W. F. Conrad, J., presiding), to determine the

matter, and a verdict was duly rendered declaring him to be insane. Whereupon the court ordered him confined in the department for the insane in the penitentiary at Anamosa, and that further proceedings against him on the indictments be suspended.

II. It is contended by counsel for petitioner that the district court had no jurisdiction to try the question of Stone's sanity, or to make any order as to his keeping; that the right to determine such matter and make such an order rested exclusively with the commissioners of insanity.

III. Motions are made, both on behalf of the commissioners of insanity and the district judge, to dismiss this proceeding. We need not set out the grounds on which the motions are based. We intend disposing of the controversy on its merits. The case, as presented, calls for a construction of statutes relating to the jurisdiction of different tribunals. Under the changed provisions of the present Code, to which we shall hereafter refer, conflicts like this here presented may often arise; and because of this we deem it best to overlook some matters of form, and give a construction to the Code provisions involved.

IV. Section 2279 of the Code provides: "On a written application made by any citizen, stating under oath, that a person confined in any prison within the county, charged with a crime but not convicted thereof nor on trial therefor, is insane, the commissioners shall cause said prisoner to be brought before them and if they find that he is insane they shall direct his removal to, and detention in, one of the hospitals for the insane. * * *" Section 5540 of the Code also relates to the same subject-matter. It is as follows: "If a defendant appears in any stage of the trial of a criminal prosecution and a reasonable doubt arises as to his sanity, further proceedings must be suspended and a trial had

upon that question." Then follow provisions as to the method of trial, and the disposition to be made of the prisoner if found to be insane; it being provided that he shall be confined in the department for the criminal insane at Anamosa. The constitution (article 5, section 6) reads: "The district court shall be a court of law and equity which shall be distinct and separate jurisdictions and have jurisdiction in civil and criminal matters arising in their respective districts in such manner as shall be prescribed by law." And in section 225 of the Code the general assembly has said: "The district court shall have general, original and exclusive jurisdiction of all actions, proceedings and remedies, both civil and criminal, except in cases where exclusive or concurrent jurisdiction is or may thereafter be conferred upon some other court or tribunal. * * *" We have set out the various provisions of law that have a bearing upon the matter under consideration. Their relevancy will appear as we proceed. The district court has exclusive jurisdiction in criminal matters, save where otherwise conferred. Certainly it will not be contended that the commissioners of insanity have any criminal jurisdiction. When the jurisdiction of the district court has once attached in a criminal case, it continues; and it extends, by express terms of the statute, to the investigation of the sanity of a defendant. When does this jurisdiction attach? it may very properly be asked. The language of section 5540, quoted above, is, "If a defendant appears in any stage of the trial of a criminal prosecution," etc. Does this mean in any stage of the trial on the indictment, or is it a phrase of broader meaning? Can it be that after the jurisdiction of the district court has attached, but before the trial of the case has actually begun, the commissioners of insanity can open the jail door, take out the criminal defendant, and dispose of him as they may think best? Surely this is not the

law. It must be that the jurisdiction of the district court attaches at the time of the service of a warrant issued upon an indictment, and that from this time it has control of the person of defendant, not only for the purpose of the criminal investigation, but for all matters incident thereto. The purpose of section 2279 was to vest the authority in the commissioners to inquire into cases of persons in prison charged with crime, and of whose mental condition there might be doubt. This is but reasonable and humane, in those cases in which no other tribunal has authority to make such investigation. But, when such authority is lodged elsewhere, neither reason nor humanity supports the claim of jurisdiction on the part of the commissioners. Section 2263 of the Code provides in substance, that the commissioners shall have cognizance of all applications for admission to the hospital, or for safe-keeping of insane prisoners, "except in cases otherwise specially provided for." Cases of defendants within the jurisdiction of the district court are "otherwise specially provided for." Even prior to the present Code there was an apparent conflict in the language of the two sections corresponding to those under consideration. Both sections were re-written, and their terms altered somewhat, by the Twenty-sixth general assembly. Under the Code of 1873 it was provided that if a person became insane after the offense and before conviction, the commissioners of insanity should have cognizance of the case. Section 1412. The district court had practically the jurisdiction it now possesses, section 4620. If section 1412 meant literally what it said, the commissioners could interfere during the progress of a criminal trial, and take a defendant out of the custody of the district court. The writer questions if the general assembly has constitutional power to give such a tribunal authority to interfere with the action of the district court in

such matters, after its jurisdiction has one attached. The apparent conflict of these sections under the Code of 1873 worked no material harm, however; for the district court, when a defendant was found insane, was obliged to commit him to the hospital for the insane, so that no contest, so far as we know, ever arose between the two tribunals. But now the court, upon a finding of insanity, must commit the defendant to the penitentiary; and we may well expect, unless the law is settled by an authoritative construction, other instances like that at bar, when it will be sought to have the defendant taken from the district court and put on trial before a tribunal whose order can only be, if insanity is found to exist, committal to one of the hospitals of the state. In the case at bar the application for the hearing before the commissioners was handed the clerk before the indictment was found; but it was not filed, nor does it appear that the commissioners met or took any cognizance of it until after the indictment was returned and filed, and the defendant placed under arrest. The jurisdiction of the district court had then attached. Some little light is shed upon this controversy by the case of *State v. Arnold*, 12 Iowa, 479. This case arose under the Revision of 1860. The inquest of lunacy was then held by the county judge and six jurors, but their jurisdiction and that of the district court was defined substantially as in the Code of 1873. It is held in this case that the district court need not allow an examination of a criminal defendant before conviction, if there is no reasonable ground to doubt his sanity. And yet, if counsel for plaintiff is right in his construction of the law, while the district court could refuse to make such investigation it could not refuse to permit another tribunal to do so. The change in the statute giving the district court power to commit insane defendants to the penitentiary at Anamosa, we think, must have been

made with a purpose. The general assembly must have had in mind such cases as that of plaintiff, who needs, not only treatment, but secure confinement, such as it is scarcely likely the hospitals are fitted to afford. We discover no error in the record before us. The action of the district judge and of the commissioners of insanity is approved, and this proceeding **DISMISSED**.

ST. CROIX LUMBER COMPANY, v. M. C. DAVIS, Appellant,
SOPHIA G. STERLING, *et al.*, Appellees.

105	27
117	749
105	27
136	345

Mechanic's Lien: MISTAKE IN STATEMENT. The mistake that will
1 nullify the statement for a mechanic's lien, must, when no one is
directly injured, be wilful and intentional.

RULE APPLIED. One who furnishes material for use in a building in
1 the process of construction will not be denied a lien for the full
amount furnished, although some of the items are not used in the
building.

SAME. An honest mistake on the part of the manager of a corpor-
1 ation which furnishes materials for the construction of a building,
in making out a statement for a lien for the entire amount,
including an account against the person acting as agent for the
owner, will not invalidate the lien, although the bookkeeper
placed in such account items for materials, which, to his knowl-
edge, did not go into the building, especially where the trial court
restated the account, deducting such items and allowing a lien
for the balance, alone.

PRACTICE. Mechanic's liens should not be allowed to parties in an
8 action to foreclose a mechanic's lien who file no pleadings and
introduce no evidence.

Mortgage: RELEASE: Liens. A mortgage on land is not released, so
2 as to let in a subsequent mechanic's lien, by the mortgagee's taking,
after the right to lien has accrued, a deed to the premises, as
security for the amount included in the first mortgage, and a new
loan, unless there was a clear intent that it should have that
effect.

Appeal from Woodbury District Court.—HON. F. R.
GAYNOR, Judge.

THURSDAY, APRIL 7, 1898.

THIS is an action to foreclose a mechanic's lien. Davis, one of the defendants, holds two mortgages on the premises, both made before the material was furnished for which the lien is sought. He also took a deed for the land after plaintiff's right accrued. Sophia G. Sterling, the former owner, who deeded to Davis, and various mechanic's lien claimants, are also made defendants. The trial court gave plaintiff a first lien, and established the liens of the other material men in an order that is not complained of. The claim or lien of Davis was adjudged subject to all the mechanics' liens, and he appeals.—*Modified and Affirmed.*

Marks & Mould, for appellant.

J. P. Blood & Co. and *H. V. Cheever*, for appellee.

WATERMAN, J.—The defendant Sophia G. Sterling was the owner of the real estate in controversy. On January 16, 1891, she executed a mortgage thereon to defendant Davis to secure the sum of three thousand dollars, with 8 per cent. interest from December 23, 1890. On July 14, 1892, she executed to said Davis another mortgage for four thousand dollars, with interest at 8 per cent. from that date. About September 24, 1892, she entered into an oral agreement with plaintiff, whereby it was to furnish lumber and other material for the erection of two dwelling houses, one on lot 12 in block 9, and one on lot 12 in block 10, in Sioux City, being a part only of the real estate described in the Davis mortgages. The other mechanics' liens claimed by various defendants grew out of the making of these improvements. Plaintiff, in compliance with said contract, furnished lumber and material, and filed its claim for a lien, showing a balance due it of two thousand two hundred and ninety-eight dollars and thirty-one cents. This statement was

filed May 27, 1893. Just prior to this, on May 24th, Sophia G. Sterling and husband deeded the premises in question to defendant Davis.

II. The first question presented, as stated by counsel, is in this form: "Is the statement of account attached to plaintiff's claim for a lien a just and true statement as required by the statute?" The
1 statement of account contained charges for material that was not intended for, and never went into the building, but which was sold to F. M. Sterling, the husband of Sophia G., who was a general contractor, and who used the material in other buildings. It may be well to say here that F. M. Sterling acted as agent for his wife in buying the material for the buildings upon which the lien is sought. The items spoken of were placed in the account by the plaintiff's bookkeeper, who was aware of the fact that the material so charged for did not go into these buildings. But plaintiff's manager, who verified the account, did not know of this error, but believed the account to be just and true. Counsel for appellant claim that this statement of account, being inaccurate, will afford no proper basis for a lien, and they rely upon *Stubbs v. Railway Co.*, 65 Iowa, 513, but we think the facts of this case do not bring it within the rule there laid down. In that case there was willful wrong; in this only an unintentional mistake, by reason of which no one has suffered. This case is ruled by *Green Bay Lumber Co., v. Miller*, 98 Iowa, 468. The mistake or inaccuracy that will nullify the statement for a lien must, at least where no one is directly injured by it, be willful and intentional.

III. The trial court re-stated plaintiff's account according to the testimony, and allowed it in the sum of one thousand, nine hundred and forty dollars and ninety-seven cents. To this amount appellant excepts,

and insists that it should be further reduced. While there are some other items of material that did not go into the buildings, we are not able to say from the evidence that plaintiff knew or had any reason to believe that it was not taken to use under the contract for Mrs. Sterling's house. We shall permit the amount fixed by the court below to stand. See *Esslinger v. Huebner*, 22 Wis. 632.

IV. The next question proposed and discussed by counsel is, "Did the mortgages given to defendant Davis merge in the deed of the property subsequently given?"

2 This proposition does not correctly embody, or exactly state, the issue presented, though it is assented to by counsel for both parties. Davis has no deed, except in form. In his answer he alleges that he took this conveyance only as security for the sum of four thousand dollars. In his testimony he says the deed was made to him to secure the payment of a sum of four thousand dollars, which Sterling was owing him in addition to the amounts secured by the two mortgages. The deed, in form, was in fact a mortgage to secure an additional sum due Davis. The testimony on this point is uncontradicted. There is no question of merger in the case. But the consideration named in this deed was thirteen thousand dollars, and it may be claimed that the presumption arising from this is sufficient to overcome the positive testimony to which we have referred, and established that Davis took this conveyance as security for the amounts included in the two earlier mortgages. This would, perhaps, be giving undue weight to the recital of consideration; but, if we felt inclined to assent to such a proposition, it would not avail plaintiff. Taking a second mortgage for the same debt does not operate to release the first mortgage so as to let in intervening liens, unless there is a clear intent so to do. *Packard v. King-*

man, 11 Iowa, 219; *Boyd v. Beck*, 28 Ala. 703; *Bolles v. Chauncey*, 8 Conn. 389; *Walters v. Waters*, 73 Ind. 425; Jones, Mortgages, section 927. This is true although the new mortgage may secure an additional indebtedness. *Gregory v. Thomas*, 20 Wend. 17. And it is also true even in a case where the first note is surrendered. *Packard v. Kingman*, *supra*. In the case at bar Davis has retained the old notes and mortgages. It was certainly against his interest to cancel his prior liens. Nothing in the testimony indicates that he intended to do so. The first two mortgages held by Davis are prior and superior liens to the lien of plaintiff. We know of no reason why he should not have been allowed to foreclose them in this action.

V. Peavey & Stephens, Frank Brown, and J. G. Herman were among the defendants who were allowed
liens on the premises in controversy. This was
3 manifestly an inadvertence. Though they were
parties to the action, they filed no pleadings, and
introduced no testimony in the trial court.

VI. There is due Davis on one mortgage three thousand dollars, with eight per cent. interest from December 23, 1890, and on the other four thousand dollars, with eight per cent. interest from July 14, 1892. For these amounts, together with one hundred and nine dollars and thirty-two cents for taxes paid, he is entitled to a first lien on the mortgaged property, and to special execution for its sale. Subject to Davis' lien, the plaintiff is entitled to a judgment and lien in the amount stated in the decree below, and subject to these two liens, the other material men are entitled to judgments and liens in the order and amounts stated in said decree, except Peavey & Stephens, Frank Brown and J. G. Herman. In the present state of the record neither of these parties is entitled to any relief. The decree as thus modified is AFFIRMED.

STATE OF IOWA V. CON FOGERTY, Appellant.

Criminal Law: EVIDENCE. Evidence that defendant, charged with

- 4 larceny, wanted to borrow money on the stolen property, is admissible on the question whether defendant, in assisting another person in bringing it to the place where it was afterwards found, or in bringing it himself, with such other person's assistance, had the intention of stealing the property or aiding therein.

CROSS-EXAMINATION. Where, in a prosecution for larceny, a witness

- 4 testified that defendant brought the property to his shop and endeavored to borrow money upon it, questions, on cross-examination, as to whether witness had not informed others that part of the property belonged to him and had been in his possession for over two years, are properly excluded, where no complicity on part of the witness was shown.

IMPEACHMENT. A witness for the state, in a prosecution for larceny,

- 4 who has testified that defendant wanted to borrow money on the property, cannot be impeached by evidence that he stated to other persons that the property belonged to himself.

INDICTMENT. An indictment for larceny alleging that the property

- 1 taken belonged to the "Skinner Manufacturing Company" is not
- 2 insufficient for failure to allege that such company is either a corporation or a partnership.

Instructions: Requested instructions are properly refused when

- 6 included in those given.

Corporations: A corporation incorporated for a specified term of

- 8 years, with the right of renewal, continues to exist for the purpose of discharging its obligations and disposing of its property, after the expiration of such time, under Code, section 1629, providing that corporations, whose charters expire by limitation, may nevertheless continue to act for the purpose of winding up their affairs.

Appeal from Palo Alto District Court.—HON. W. B. QUARTON, Judge.

THURSDAY, APRIL, 7, 1893.

THE defendant was accused and convicted of the crime of larceny, and from judgment of imprisonment in the penitentiary he appeals.—*Affirmed.*

D. E. Collins, B. E. Kelly and Parsons & Riniker for appellant.

Milton Remley, attorney general, *John Menzies*, County Attorney, and *Jesse A. Miller*, for the state.

LADD, J.—On February 17, 1897, one band saw and frame, an emery stand and shaft, two emery wheels, a machine punch, tire shaper, five sets of tires, some horseshoe iron, fifty packages of bolts, assorted bolts, three vises, one drill, four axle stubs, some belting, and two buggy poles were the property of, and stolen from a building of, the Skinner Manufacturing Company, in Emmetsburg. Foy was in charge of the building and property. The defendant was stopping with Jacob Stambach, at Ayrshire; and it is claimed he and John Stambach, a son of Jacob, went to Emmetsburg, stole the property and placed it in Jacob's blacksmith shop. On the trial, John Stambach testified that he simply accompanied the defendant, with the understanding that it was his property, and that he was only assisting him in its removal to Ayrshire, and did not know that it was stolen until several days, while the defendant says he had nothing to do with obtaining the property from the building or shop at Emmetsburg; that he simply rode home with Stambach, and had no knowledge the goods were being stolen.

II. The indictment alleges that the building from which the property was taken, and also the property belonged to the Skinner Manufacturing Company; and the defendant insists, by motion in arrest of judgment, that it is insufficient, in that it does not aver that the company is either a co-partnership or a corporation. In a civil proceeding, the capacity of a corporation or a partnership must be alleged. Code, section 3627; *Byington v. Railroad Co.*, Vol. 105 Ia—3

11 Iowa, 502; *Sweet v. Ervin*, 54 Iowa, 102. An exception seems to exist where the charter of the corporation is by an act of legislature. *Harl v. Decorah*, 43 Iowa, 313. There is apparent conflict in the authorities as to whether it was necessary, at common law, to aver the capacity of a corporation in an indictment for stealing goods. See note to section 110 of Wharton's Criminal Pleading and Practice. That author says the question depends upon whether the court takes judicial notice of the charter. Where corporations are organized as in this state, judicial notice is not so taken, and capacity must be alleged when this is not obviated by statute. *Thurmond v. State*, 30 Tex. App. 539 (17 S. W. Rep. 1098; *McCowan v. State*, 58 Ark. 17 (22 S. W. Rep. 955); *People v. Bogart*, 36 Cal. 248; *Wallace v. People*, 63 Ill. 451; *State v. Mead*, 27 Vt. 722. The strict rules of the common law in regard to ownership have been modified by our Code, which provides that "when an offense involves the commission of or an attempt to commit an injury to a person or property, and is described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the name of the person injured or attempted to be injured is not material." Code, section 5286. Under this section an indictment for burglary need not allege the corporate capacity. *State v. Watson*, 102 Iowa, 651. A distinction is made in pleading this crime and that of larceny by the supreme court of California. See *People v. Henry*, 77 Cal. 445 (19 Pac. Rep. 830). In *State v. Carr*, 43 Iowa, 418, it was held, under an indictment for robbery, that, although the name of the person robbed was alleged to be John Kopek, the defendant might be convicted on proof that his name was John Shoppick, as this did not prejudice the defendant. In *State v. Cunningham*, 21 Iowa, 433, where an indictment charged that the property was taken from the person of George W.

Archer, a conviction was supported by proof that it belonged to George W. and Thomas J. Archer, as partners, and it is there said: "While we would guard with jealous care every right of a party thus charged, we believe the spirit of the law is best maintained by looking to its substance, its object and purpose, rather than to defeat its operation by adhering with too great tenacity to old forms and technicalities,—forms and technicalities which, though ever so just and necessary in particular cases, operated not unfrequently to impair the force and vigor of the law, rather than promote certainty and efficiency in its administration." Under a similar statute, the supreme court of Kentucky adjudged an indictment sufficient which laid the ownership of stolen property as that of the Tennessee River Packet Company, D. W. Swan, Little Bros., and others, without stating the names of the several owners. *State v. Bell*, 65 N. C. 313, is in point, and it is there said: "The name of the owner of the property stolen is not a material part of the offense charged in the indictment, and it is only required to identify the transaction, so that the defendant, by proper plea, may protect himself against another prosecution for the same offense. * * * The owner may have a name by reputation, and, if it proves that he is as well known by that name as any other, a charge in the indictment in that name will be sufficient." The identical question is determined in *State v. Grant*, 104 N. C. 908 (10 S. E. Rep. 554). If, under an allegation of ownership in an individual, proof thereof in a partnership will support a conviction, it may well follow that, under the charge of property in a partnership, proof that it belonged to a corporation of the same name would be sufficient. If the name is alleged with such certainty as to point out the owner, though omitting to mention whether a co-partnership or corporation, and the offense in other

respects is definitely described, the owner may be shown to be either, as the defendant, with such a record, may protect himself against another prosecution. In this case it was not material to the defendant whether the Skinner Manufacturing Company was a corporation or a co-partnership, as in all other respects the act was fully identified; and the failure to allege capacity was not material, as no prejudice resulted.

III. It is asserted by the defendant that there is no proof of the existence of the Skinner Manufacturing Company. The articles of incorporation were introduced in evidence, and article 3 is as follows: "This incorporation is to commence on the 2d day of March, 1885, and continue for ten years, with the right of renewal in accordance with [section] 1069 of the Code of Iowa [of 1873]." No evidence of any renewal was introduced. The authorities hold that, in the absence of any statute, the corporation would cease to exist as such upon the expiration of the ten years. See 4 Am. & Eng. Enc. Law, 295; Clark, Corporation, 249; *Bradley v. Reppell* (Mo. Sup. 32 S. W. Rep. 645); *Thompson, Corporation*, 530; *Sturges v. Vanderbilt*, 73 N. Y. 384. But our statute provides, "Corporations whose charters expire by limitation or the voluntary act of the stockholders may nevertheless continue to act for the purpose of winding up their affairs." Code, section 1629. Under this section, the Skinner Manufacturing Company continued to live, for the purpose of discharging its obligations and disposing of its property. *Muscatine Turn-Verein v. Funck*, 18 Iowa, 269; *Railroad Co. v. Horton*, 38 Iowa, 33. See also, *Miller's Adm'x v. Newburg Orrel Coal Co.*, 31 W. Va. 836 (8 S. E. Rep. 600.) The property continued that of the corporation until it was disposed of in winding up its affairs, and the corporation remained in existence for that purpose.

IV. Jacob Stambach testified that defendant brought the property stolen to his shop, and that he had a conversation with him on the following morning, in which he told Fogarty that he did not believe it was his stuff, and that he did not want it, and that, two or three days later, defendant wanted to borrow money on it. On cross-examination he was asked this

4 question: "Didn't you tell Mr. Rex, at Ayrshire, Iowa, in the month of February, 1897, and a few days after the property came to your shop, and also tell Mr. Mitchell at the same time and place, that this punch (being a part of the property in controversy) you had had for over two years, and that it was your punch?" The objection, "incompetent, irrelevant, and immaterial, and not proper cross-examination," was sustained. The same question was repeated, with the addition of the words, "and that you bought it from a fellow at Estherville, Iowa?" and the answer excluded on a like objection. Other similar questions were asked and like objections sustained. The rulings were correct. No complicity on the part of Jacob was shown, and the evidence offered was admissible, if at all, as affecting his credibility as a witness. That the property was stolen and taken to Jacob's shop was not questioned. The main issue on the trial was whether the defendant, in assisting John Stambach in bringing it there, or in bringing it himself with John's assistance, had the intention of stealing, or aiding therein. As bearing thereon, the testimony of Jacob that Fog-

5 erty wanted to borrow money on the property was material. But the statements to Rex or Mitchell or Gates, if made, claiming ownership, did not tend in any way to contradict his testimony that the conversation occurred as related, or that the defendant stated that he wanted to borrow money on the property. Such statements indicated that Jacob

was claiming the property as his own, and, had he been on trial, might have been received as tending to show guilty participation on his part. But they in no way contradicted the testimony that Fogerty desired to borrow money on this property, and for this reason were not impeaching in character.

V. The exceptions to the instructions are without merit. All of them are in accord with those heretofore approved by this court. See *State v. Schlager*, 19 Iowa, 169; *State v. Burton*, 103 Iowa, 28. Those requested, in so far as correct, were included in the instructions given. We discover no error in the record and the judgment must be **AFFIRMED.**

STATE OF IOWA V. HARRY M. MARSHALL, Appellant.

Criminal Law: EVIDENCE The evidence, when taken as a whole and fairly considered, must, in order to justify a conviction of a crime, so satisfy the judgments and consciences of the jury as to exclude every other reasonable conclusion, but absolute certainty is not required.

JURY QUESTION The truthfulness of an explanation of the possession of stolen goods, although uncontradicted, must be determined by the jury.

RULE APPLIED. On a trial for burglary, to commit larceny, the evidence showed that goods in the possession of the accused were identified as the goods stolen; that the accused worked in a bakery adjoining the store from which the goods were stolen; that he had access to the bakery at all times; that the bakery and adjoining store were separated by a board partition, containing a window; that a screw driver used in the bakery fitted marks made on the window and partition; that possession was explained by the purchase of the goods from strangers; that the accused's father and mother claimed to have seen two strangers leaving the bakery about the time of the alleged purchase. *Held*, sufficient to support a conviction.

PRACTICE. A party who makes no objection to a question asked a witness, cannot ask that it be stricken from the record, where the answer is unsatisfactory to him.

106	38
108	16
108	39

105	36
110	355

106	38
115	510

105	38
119	420
105	38
121	566
122	4
123	352

105	38
132	699
133	39

106	38
134	188

106	38
137	323

SAME. A witness having testified that goods were stolen from his store,
9 it does not assume that a larceny had been committed to ask him
what were the goods stolen and to name them.

HARMLESS ERROR. A witness testified to the presence of a sack of
10 candy in his store, where an accused worked. There was no evi-
dence that the accused had anything to do with the candy. *Held*,
that this evidence was not prejudicial.

RELEVANCY. Evidence was admitted as to the condition of the doors
10 and windows of a burglarized building shortly after the burglary.
Held, admissible to show the condition of the premises at, or
about the time of the burglary.

SAME. An objection to the competency of the county attorney as a
8 witness on a criminal trial, because his name was not indorsed on
the indictment, is too late, when made after his evidence has been
given, although the trial judge asked the questions and defend-
ant's counsel claims to have refrained from making objections out
of deference to the court.

SAME: Examination by judge. Defendant on a criminal trial may,
5 where questions are asked by the judge, object when the questions
are asked, or move to strike out the evidence elicited immediately
on the conclusion of the judge's examination.

SAME. The trial judge may ask questions leading in character.
4 Citing *Huffman v Cauble*, 86 Ind., 59.; *Comm. v. Galavan*, 9 Allen,
271.

Grand Jur.: MINUTES OF EVIDENCE The use by the grand jury of
8 the minutes of a witness examined before the committing mag-
istrate is equivalent to an examination of the witness before such
grand jury, under Code, 1873, section 4421, when construed in con-
nection with sections 4273, 4289.

EVIDENCE. It will be presumed that the evidence of witnesses whose
7 names were endorsed on an indictment and the minutes of their
evidence returned therewith, were properly before the grand jury,
and such presumption can be overcome only by an affirmative
showing that they did not testify before the grand jury, and that
no notice was served, and, also, that they either did not give evi-
dence before the committing magistrate, or that the minutes
thereof, made by him, were not used by the grand jury.

SAME Other evidence than the minutes on the trial is admissible to
6 determine whether or not a witness was in fact examined before
the grand jury or committing magistrate, although the minutes
returned with the indictment are made, by the statute, conclusive
as to what names are or should be indorsed on the back of the
indictment

Appeal. A conviction will not be reversed on appeal because of evidence drawn out by appellant on cross-examination and afterwards withdrawn from the jury on his motion.

Appeal from Benton District Court.—OBED CASWELL,
Judge.

THURSDAY, APRIL 7, 1898.

THE defendant was accused and convicted of the crime of burglary, and, from judgment of imprisonment in the penitentiary for a period of eighteen months, he appeals.—*Affirmed.*

Tom H. Milner for appellant.

Milton Remley, attorney general, and *Jesse A. Miller* for the state.

LADD, J.—The indictment charges the defendant with breaking and entering the store building of Cady & Anderson in the night-time of June 12, 1897, with intent to commit larceny. At that time he was in the employment of Robinson, who kept a bakery in the building next to that of Cady & Anderson, and the basement of the two buildings were separated by a board partition, in which there was a window. This window had been securely nailed in prior to the night in question, and, after that, is shown to have been

1 fastened in a different manner. The defendant boxed and shipped several dress patterns, lining, hose, and handkerchiefs, and other articles to Naomi Houston, his then fiancée, at Marion, on the morning of the second day after the alleged larceny. These goods were identified by Anderson as the property of his firm, and as having been stolen. Maggie McKee, who usually had charge of the dry-goods department, says she missed goods on the fifteenth of June, and

found those on the shelves jammed in, and not properly folded. Two other clerks sometimes sold merchandise from this department. A screw-driver at Robinson's was shown to fit the marks made on the partition and window in changing it. The defendant had a key to Robinson's bakery. In explaining his possession, he testified that early in the morning, after the goods were taken, two strangers entered the bakery, and offered to sell a watch and chain, and, upon his refusal to buy, stated they wished to obtain something to eat, and offered to sell the goods in controversy for two dollars; that, when they unrolled them on the counter, he purchased without further examination. The defendant's father and Husted state they saw two strangers leaving the bakery at about that time. The defendant had previously promised to purchase his fiancée goods such as those in controversy. With this condition of the record, it seems hardly necessary to say that the verdict is sustained by the evidence. That the other clerks might have sold the goods was a circumstance for the consideration of the jury, but not controlling when viewed in the light of the established facts. The claim of a purchase from strangers is one very commonly made by those found in possession of stolen property, and is usually, as in this case, discredited by the attending circumstances. Had there been any such a purchase, Marshall would have examined the goods, and told his employer. The coincidence of the entire strangers bringing to him, for a trifling sum, the particular goods requested by his betrothed, is incredible.

2 Similar occurrences are frequent in fable, but seldom, if ever, happen in real life. The extreme improbability of his account was such that, although undisputed, its truthfulness was for the determination of the jury.

II. It appeared on the trial that only one of the witnesses testified before the grand jury, and no notice that the state would use others was given defendant.

The county attorney was called as a witness, and
3 testified, without objection, that the defendant was indicted in part upon the minutes of the evidence taken before the committing magistrate, and that the substance of this was attached as minutes to the indictment. The defendant moved to strike out this testimony, because the method of proof was not proper or competent, and the matters could only be established by the record, and also because the name of this witness was not indorsed on the indictment, and no notice was given that he would be used. This motion was overruled. The objection to the witness came too late. *State v. Hurd*, 101 Iowa, 391. It seems the trial judge propounded the questions to the witness, and the defendant's counsel, in an affidavit attached to the motion for new trial, excused himself for not mak-

ing proper objections on the score of deference
4 to the court. The authorities are agreed that the judge may ask questions leading in character. *Huffman v. Cauble*, 86 Ind. 591; *Com. v. Galavan* 9 Allen, 271. See *Sessions v. Rice*, 70 Iowa, 306; But in other respects his examination of a witness is subject to the same legal objections as may be interposed when conducted by a party or his attorney.

People v. Lacoste, 37 N. Y. 192; *Sparks v. State*,
5 59 Ala. 82. But we think the rule which requires a party to make his objection to the questions when asked, and precludes him from awaiting the answer of the witness, and then moving to strike them out, ought not to prevail when the examination is conducted by the court. The jurors naturally assume the interrogatories of the presiding judge to be proper, as they are presumed to be, and look upon

objections made thereto by counsel as being in the nature of mere interruptions. Often the character of the case is such that the attorney might otherwise be compelled to elect whether he will save his record or brook the ill will of the jury. Besides, it is always embarrassing to persist in interposing objections, especially in some courts, although one might believe the examination improper or irrelevant to the issues, and prejudicial to his client. It was the privilege of defendant to either make objections to the questions of the court when asked, or move to strike out the evidence elicited immediately upon the conclusion of the judge's examination.

III. The ruling of the court in refusing to exclude the evidence is not in conflict with *State v. Little*, 42, Iowa, 51, and *State v. Miller*, 95 Iowa, 368. These cases simply hold that, on a motion to set aside an indictment because the names of all witnesses examined before the grand jury are not indorsed thereon, the minutes returned therewith are made by the statute conclusive as to what names are or should be indorsed on the back of the indictment. This does not preclude the use of evidence other than the minutes on the trial, in order to determine whether the witness was in fact examined before the grand jury or committing magistrate. *State v. Porter*, 74 Iowa, 623.

Whether the record and minutes of the magistrate are the best evidence that witnesses were examined, and minutes thereof returned by him with the papers to the clerk, we shall not determine, as that objection was not urged in the motion. In any event, the showing that the witnesses did not testify before the grand jury was not sufficient to warrant this inquiry. Their names were indorsed on the indictment, and minutes of their evidence returned therewith. Under such circumstances, it is presumed their evidence was properly before the grand jury; and to overcome this presumption, it must be made to affirmatively

appear, not only that they did not testify before the grand jury, and no notice was served, but also that they either did not give evidence before the committing magistrate, or else that the minutes thereof made by him were not used by the grand jury. Section 4221 of the Code of 1873 must be construed in connection with sections 4273 and 4289. To give to each section 8 the effect intended, it must be held that the use of the minutes of a witness examined before the committing magistrate by the grand jury is equivalent to an examination of the witnesses before that body. The written examination takes the place of the oral, and to this extent section 4421 is modified by the other sections. *State v. Beal*, 94 Iowa, 39; *State v. Cook*, 92 Iowa, 483; *State v. Wise*, 83 Iowa, 596; *State v. Rodman*, 62 Iowa, 456.

IV. This question was asked Anderson, "What were the goods that were stolen, and name some of the goods that were stolen at the time?" and objected to as assuming that a larceny had been committed 9 when none had been shown. The witness had previously testified, however, that the goods had been stolen from the store. Robinson testified to having found a sack of candy in his store of a kind not sold by him, and the defendant objected to its introduction in evidence because not identified as having 10 been taken or stolen. There is no evidence that the defendant had anything to do with this candy, but its use in evidence could not possibly have worked any prejudice to him. The defendant also objected to evidence as to the condition of the doors and windows for several days after June 12th, because there was nothing to connect him therewith. He 11 allowed this testimony to go in without objection, and then moved for its exclusion. A party cannot be permitted to wait for an answer, and then, if

unsatisfactory, ask that it be stricken from the record. But, in any event, the evidence was admissible as showing the condition of the premises at or about the time of the transaction, and as indicating a probable way by which entrance was obtained when the goods were taken.

The defendant next urges that the court erred in allowing Naomi Houston to testify to the contents of a letter without having shown its loss. This evidence was drawn out by defendant on cross-examination, and was afterwards withdrawn from the jury on his motion. He is not therefore in a situation to complain, and no instruction with reference thereto was required unless requested.

V. The instruction on reasonable doubt was evidently taken from the language of Dillon, J., in *State v. Ostrander*, 18 Iowa, 435 (page 458 of the opinion). It closes with this clause: "Absolute certainty is not required, and it is rarely, if ever, possible in any case; but, to justify a conviction, the evidence, when taken as a whole, and fairly considered, must so satisfy your judgments and consciences as to exclude every other reasonable conclusion." This is a correct statement of the law. Absolute certainty is seldom possible, and never required. But the conclusion must be so certain as to exclude any other reasonable hypothesis. The other instructions state the law as approved by this court. See *State v. Hayden*, 45 Iowa, 11; *State v. Ham*, 98 Iowa, 61; *State v. LaGrange*, 94 Iowa, 60; *State v. Mecum*, 95 Iowa, 433; *State v. Ormiston*, 66 Iowa, 143. The instructions as a whole are clear, comprehensive, and correct. We discover no error in the record, and the judgment is AFFIRMED.

ROXY H. MORBEY, ADMINISTRATRIX, v. THE CHICAGO &
NORTHWESTERN RAILWAY COMPANY, Appellant.

Evidence: RAILWAYS: custom. Evidence that clinker pullers in the employment of defendant railway company did at times move engines to the knowledge of the foreman in charge of the work. 7 and that he did not forbid them, may tend to prove that they acted by authority in so moving them, although the practice did not amount to a general custom.

AUTHORITY OF EMPLOYEE. Evidence that a railway employe, through whose negligence plaintiff's intestate was killed while in defendant's employ. was employed to remove ashes and fire from its engines, does not tend to prove that he was employed to move 8 engines or that he had any implied or apparent authority to move them.

PROVINCE OF JURY. The jury is not authorized to presume, in the absence of evidence to that effect, that plaintiff's intestate, for 3 whose death while in defendant's employ suit is brought, was violating his instructions by sitting on the railroad track while cleaning out the ash pan of an engine.

Instructions. Action for negligence causing the death of a railroad employe—the negligence charged was that said employe was under an engine engaged in cleaning out its ash pan, that an employe whose duties did not require him to operate engines ran one 1 against the first engine thus causing the death of the employe at 4 work under it. The court instructed that contributory negligence of the decedent should not defeat a recovery if the jury found 6 that the foreman who had charge of the work of the employe who operated the second engine, without authority, knew when he got on the engine that the engine was in the hands of that employe, that it must collide with the first engine unless stopped and knew that decedent was working under said first engine, and if the foreman could, by reasonable care and diligence, have prevented the collision. The evidence showed that if the wheels of the first engine had been blocked, as they should have been, decedent would not have been injured. *Held*, The instruction was erroneous in assuming that decedent must necessarily have been injured by an unexpected movement of the engine under which he was at work, and that the foreman knew the fact first assumed.

SAME. Error in requiring defendant in an action for personal injuries to prove lack of knowledge of a given fact, the burden of proof

5 of which rests upon plaintiff, is not cured by the fact that another instruction throws the burden of proving such fact upon plaintiff.

RULE APPLIED. Plaintiff in an action for the death of a railroad employe, alleged to have been caused by the negligence, while operating an engine, of another employe whose duties did not
5 require him to operate engines, has the burden of showing that the defendant had knowledge that such employe did operate engines, where the ground of negligence set up is that the foreman in charge knew of the habits of such employe of running engines and did not prevent him from doing so.

Negligence: CONTRIBUTORY NEGLIGENCE: *jury question*. In an action for the death of an employe of defendant, where there is
2 evidence that the accident occurred by the unauthorized act of another employe, that it might have been prevented by a third employe, and where the evidence did not show that decedent was necessarily negligent, a refusal to direct a verdict for defendant was proper.

Appeal from Clinton District Court.—HON. P. B. WOLFE,
Judge.

THURSDAY, April 7, 1898.

ACTION at law to recover for damages alleged to have resulted from negligence on the part of the defendant which caused the death of the plaintiff's intestate, Clem L. Morbey. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendant appeals.—*Reversed*.

Hubbard, Dawley & Wheeler for appellant.

Chas. A. Clark & Son and *C. H. George* for appellee.

ROBINSON, J.—The facts involved in the death of Morbey are substantially as follows: On the twenty-eighth day of December, 1894, he was in the employment of the defendant as clinker puller or pitman, at Clinton, in this state. The defendant has at that place a roundhouse of sufficient capacity to hold a considerable number of locomotive engines. The roundhouse

is connected with the main line and other tracks by means of what is known as the house or pit track. In that track, opposite the central part of the roundhouse, is a turntable, which is used in transferring engines to and from the roundhouse. East of that and under the track, are two pits, which are used for removing ashes and clinkers from engines. Each pit is about fourteen feet in length, and four feet in width, and two feet in depth from the level of the tops of the rails. Of these pits the one furthest west is south of the southeast corner of the roundhouse, and the other is a short distance further east. Thirteen feet east of the roundhouse is a water tank, and about seventy feet east of the roundhouse is a sandhouse. When an engine is to be cleaned and placed in the roundhouse, it is run onto the pit track east of the sandhouse. It is there taken by an employe known as an "hostler," or by the hostler's helper, and in due time is placed over one of the pits. An employe known as a "knocker" climbs into the cab, and another employe, called a "clinker puller" or "pit-man," goes into the pit under the engine, and removes from the ash pan the ashes which shake into it while the engine is moving. He then gives a signal. The knocker turns on the blower, drops the drop grate, and with an iron bar knocks the fire, cinders, and clinkers out of the fire box. They drop into the ash pan, are there drenched with water, and are then drawn into the pit by the clinker puller. In cleaning the ash pan, he stands in front of it, and uses an iron hoe with a handle from seven to nine feet in length. If the engine be small, he is unable to stand erect, but is obliged to stoop somewhat if he works while standing. After the engine is cleaned, it is moved onto the turntable, and thence into the roundhouse. On the night of the accident, engine numbered 383 was moved onto the pit we have described, which is furthest west. A knocker was in the cab, and the

decedent was in the pit, for the purpose of cleaning the ash pan. At that time engine 355 was standing on the pit track, a short distance east of the sandhouse, headed westward, but no one was on it. A clinker puller, named McGovern, after performing some service on engine 383, left it, and went to engine 355, took possession of it, and commenced to practice with it. He first ran it westward towards engine 383, then eastward, and then westward again, and when the engine was opposite the sandhouse, a hostler's helper, named Rahm, with a lantern in his hand, stepped from the ground into the cab. There is a conflict in the evidence as to what then occurred, but a few moments later the engine struck No. 383, and moved it forward from ten to sixteen feet. Morbey was caught under one of the drive wheels, and it passed over him, causing his death within a few minutes. It is alleged that the accident was caused by negligence on the part of the defendant, in that its employes, charged with the duty of caring for and operating engine 355, failed to use due care in the control and management of it; that McGovern was without sufficient knowledge or skill to be intrusted with an engine; and that Rahm failed to use due care after he went into the cab of engine 355 to stop it in time to avoid the collision. The defendant denies all negligence on its part, but admits that McGovern was not competent to manage an engine. It says, however, that he was not authorized, but, on the contrary, was forbidden, to move engines; that it was not a part of his duties, nor within the scope of his employment, to move them; and that, in doing so, he acted as a mere volunteer, and violated the rules of the defendant. It is claimed, further, that Morbey had assumed the risks of his employment; that he contributed to the accident by negligence on his part; and that the accident was not in any manner

connected with the use and operation of a railway, within the meaning of the statutes of this state.

I. When the evidence had been fully submitted, the defendant asked the court to direct a verdict in its favor, for the alleged reason that there was not sufficient evidence to authorize a verdict for the plaintiff. There was much evidence which tended to show that clinker pullers were not authorized to move engines; that McGovern had been forbidden to do so; and that none of the agents of the defendant charged with the duty of enforcing the rules had any knowledge that he had at any time moved engines, or that the rules forbidding clinker pullers to move them were disobeyed. There was also evidence which tended to show that Rahm did not know who the person who had charge of engine 355 was, in time to prevent the collision, but supposed that he was a competent person.

2 There was evidence, however, which tended to show that clinker pullers, who were not specially authorized to do so, very frequently, if not habitually, moved engines, and that the employes of the defendant who had authority over the clinker pullers and engines, and who were authorized to enforce the rules of the defendant, had knowledge of the practice, and did not forbid it. The night of the accident was dark, and the light in the cab of engine 355 was dim. McGovern and Rahm do not agree respecting what occurred in the cab immediately preceding the accident; but both men knew that some one was in the pit under engine 383, and Rahm knew that McGovern was not competent to operate an engine. Some of the evidence tended to show that Rahm, after he entered the cab, recognized McGovern in time to have taken the engine and

3 prevented the accident. The evidence did not necessarily show that Morbey contributed to the accident on his part. It was shown that on a former

occasion he had been seen to sit on the rail in front of a drive wheel while pulling clinkers; that it was dangerous to do so; and that he had been ordered by the employe in charge of the work to discontinue the practice. It also appears that the drive wheel passed over his body from its left side, but no one saw him on the rail before the accident. The evidence does not show whether he was sitting on the rail, or was leaving the pit, or doing some other permissible act when the accident occurred. The jury was not authorized, in the absence of evidence to that effect, to presume that he was violating his instructions. We are of the opinion, therefore, that the district court properly refused to direct a verdict for the defendant.

II. The district court charged the jury as follows: "(5) To entitle the plaintiff to a verdict, she must prove to your satisfaction by a preponderance of the evidence,—that is, by the greater or superior evidence: *First*, that the said Clem L. Morbey was killed by reason of one engine of the defendant running into another engine; *second*, that, at the time of the accident, the defendant was negligent, and that Morbey's death was caused by said negligence; *third*, that said Morbey was not guilty of any negligence that directly contributed to his death. If you find all of said facts established in plaintiff's favor, your verdict should be for her; but, if she fails to establish any one of said facts, your verdict should be for the defendant. (6) All the facts of negligence charged against the defendant are withdrawn from your consideration, except the two following propositions: What right, if any, had McGovern to move or handle engines? Could Rahm, after he knew that McGovern was running the engine, have prevented the accident by the exercise of reasonable care and diligence on his part? * * * (9) * * * If you find from the evidence that the defendant's foreman, or whoever was in charge of the work

McGovern was engaged in the performance of, knew he was in the habit of or did run engines, and
4 that said foreman, or those who had charge of said work, did not prevent or forbid his doing so after they knew he was so doing,—if you find they did know it, then, and on your so finding, and on your finding that the plaintiff's intestate was not guilty of any negligence that contributed to his death, you would be warranted in finding for the plaintiff. (10) While it is admitted that McGovern was in the employment of the defendant as a clinker man, and that he committed the act which caused the death of Morbey, yet if you find from the evidence that at the time in question he had no authority to handle or move engines, and that the defendant's foreman, or whoever was in charge of the work McGovern was engaged in, did not know he was handling or moving engines, on your so finding, he would not be acting within the scope of his authority or employment, or in furtherance of the defendant's business, but was carrying into effect some purpose of his own, not connected with his employment, and the defendant would not be liable for such acts."

The defendant complains of the tenth paragraph, on the ground that it authorized a recovery by the plaintiff unless the jury should find affirmatively that McGovern had no authority to handle
5 engines; thus placing the burden of showing such want of authority upon the defendant. The plaintiff contends that the portions of the charges we have set out, when considered together, instructed the jury clearly that the burden specified was upon the plaintiff. If, however, such an interpretation was authorized, we do not think it is at all clear that it was the one which the jury adopted. It is true that the charge instructed the jury that the burden was on the plaintiff to prove negligence on the part of the defendant, and the sixth para-

graph narrowed the inquiry to two questions, the first of which, and the one involved in the objection under consideration, was, "What right, if any, had McGovern to move or handle engines?" From the ninth paragraph of the charge the jury would naturally have concluded that the burden of proving that the defendant's foreman, or other agent in charge of the work in which McGovern was engaged, knew that he ran engines, was upon the plaintiff; yet the jury might well have concluded that the tenth paragraph required the defendant to show that McGovern did not have authority to handle engines, and that it did not know that he was handling them. We do not think the jury should have been left in doubt as to the party on whom the burden of proof rested. It was shown that the duties of McGovern did not require him to operate engines, and in view of that fact the burden was on the plaintiff to show that the defendant had knowledge that he did operate them. The tenth paragraph of the charge is, in legal effect, similar to instructions condemned in the cases of *Gwynn v. Duffield*, 66 Iowa, 708, and *Nelson v. Railroad, Co*, 38 Iowa, 564, and is erroneous. The evidence submitted justifies the conclusion that the error was likely to be prejudicial.

III. The court, in the eleventh paragraph of the charge, instructed the jury that negligence of the decedent which contributed to his injury would not defeat a recovery by the plaintiff if it were found
6 "that Rahm when he came upon the engine, knew that it was in the hands of McGovern, and knew that, unless it was stopped, it would collide with the engine then standing on the pit, and that he knew that some one was working under the engine on the pit," and could, by the use of reasonable care or diligence, have prevented the collision, or have given warning which would have enabled the decedent to

escape the danger. It is said this portion of the charge is erroneous, because the evidence showed that it was the duty of Morbey to block the wheels of the engine he was under with blocks provided for that purpose, and that he failed to do so; that he would not have been injured had he blocked the wheels, or had he not been sitting on the rail; and that Rahm is not shown to have known that the wheels were not blocked, nor that Morbey was sitting on the rail; hence that Rahm did not know of Morbey's peril. We are of the opinion that the charge was erroneous in assuming that the decedent would necessarily have been injured by an unexpected movement of the engine he was under, and in assuming that Rahm knew that such was the case. There was evidence which tended to show that engine 355 was moving slowly when Rahm went upon it; that, if the wheels had been blocked, Morbey would not have been injured; and that, if he had remained in the pit, he need not have been injured, for the reason that the lowest part of the engine inside the rail was three feet or more higher than the bottom of the pit, and would not have touched him had he crouched on the pit bottom, as was sometimes done by clinker pullers when engines were moved onto and off of the pits. We do not think that paragraph eleven of the charge fairly presented the law and the duty of Rahm under facts which the jury may have found to exist at the time of the accident.

IV. The court refused to give an instruction asked by the defendant, in words as follows: "The fact that McGovern was employed by the defendant to remove
ashes and fire from its engines does not tend to
7 prove that he was employed to move engines, or
that he had any implied or apparent authority
to move them." We think that this or something of a
similar character should have been given.

V. The fourth instruction asked by the defendant, and refused, is as follows: "(4) The fact, if it be a fact, that McGovern or other clinker pullers had at times moved engines would not tend to prove that McGovern had authority to do so, unless the plaintiff further shows by a fair preponderance of the evidence that it was the general custom for clinker pullers to move engines, and that such general custom was known to the foreman, and not forbidden by him."

8 Although this instruction, with some modification, may well have been given, yet the court did not err in refusing to give it in the form asked. The fact that clinker pullers did at times move engines, if known to the foreman in charge of the work, and not forbidden, might tend to prove that they acted by authority, even though the practice did not amount to a general custom. This objection is also applicable to the sixth instruction asked by the defendant.

VI. The conclusions we reach dispose of the controlling questions in the case. Others discussed depend upon the evidence, and may not arise on another trial. For the errors pointed out, the judgment of the district court is REVERSED.

LEE R. WILSON V. SAMUEL W. TUCKER, *et al.*, Appellants.

Limitation of Actions: STATUTE. The running of the statute of limitations against a judgment recovered in 1863, at which time the law authorized an action to be brought on a judgment at any time within *twenty* years was not stopped by Code 1873, section 2521, providing that no action shall be brought on any judgment in a court of record within *fifteen* years after its rendition without leave of court, and section 47, providing that all previous act revised in such Code or which are repugnant to its provisions are repealed, subject to the limitations therein expressed, and section 50, providing that the repeal of existing statutes shall not affect any right which has accrued in any civil cause before the time when such repeal takes effect.

Appeal from Lee District Court.—HON. H. BANKS, JR.,
Judge.

THURSDAY, APRIL 7, 1898.

ACTION on a judgment. Judgment for plaintiff,
and the defendants appealed.—*Reversed.*

McVey & McVey and *John E. Craig* for appellants.

M. J. Roberts for appellee.

GRANGER, J.—I. A motion by appellee to dismiss
the appeal is overruled.

II. Plaintiff is the assignee of a judgment rendered against the defendants, February 9, 1863. This suit was commenced November 20, 1895, on said judgment. It will be seen that more than thirty-two years expired after the rendition of the judgment and before the commencement of this suit. The controlling question in the case is as to the statute of limitations. Appellee insists, in different ways, that the question is not properly before this court, but we think it is. In our consideration of the case, dates are important because of changes in the law as to the limitation of actions since the judgment was entered in 1863. Prior to the taking effect of the Code of 1873, actions on judgments in courts of record could be brought at any time after rendition, for a period of twenty years. The language of the Revision in force from 1860 was: "The following actions may be brought within the times herein limited respectively after their causes accrue, and not afterwards: * * * Those founded on a judgment of a court of record * * * within twenty years." As a cause of action accrued on a judgment at its date, in 1863, the statute of limitations commenced

to run on the judgment in question February ninth of that year, and had run more than ten years when the Code of 1873 was adopted, with the following provision as a part of section 2521 thereof: "No action shall be brought upon any judgment, against a defendant therein, rendered in any court of record in this state within fifteen years after the rendition thereof, without leave of court." Its effect is to prevent a cause of action accruing on a judgment for fifteen years after its rendition. If this section is applicable to judgments rendered before the section was enacted, some questions difficult of solution, are presented, as, is the statute of limitations, in its operation as to such judgments, suspended for fifteen years after the law took effect, to then commence running again? and, if so, what shall be the period that it shall then run? Is the ten years from 1863 to 1873 to be disregarded, or must it be counted as a part of the twenty years necessary to create the bar to an action? The following is a section of the Code of 1873, and is important in the determination of the question we are considering:

"Sec. 47. All public and general statutes passed prior to the present session of the general assembly, and all public and special acts, the subjects whereof are revised in this Code or which are repugnant to the provisions thereof, are hereby repealed, subject to the limitations and with the exceptions herein expressed."

It is not to be seriously questioned that the Code of 1873 so far changed the prior law as that causes of action on such judgments did not accrue at the date thereof, but in fifteen years thereafter; and the effect of section 47, above quoted, was to repeal the prior law in so far as it gave a right of action on a judgment from and after its rendition, unless such a result is avoided by the limitations or exceptions expressed in the act. Section 50 of the same Code is as follows:

"Sec. 50. This repeal of existing statutes shall not affect any act done, any right accruing or which has accrued or been established, nor any suit or proceeding had or commenced in any civil cause before the time when such repeal takes effect; but the proceedings in such cases shall be conformed to the provisions of this Code as far as consistent."

As we have said, when the judgment was entered in 1863, the right was by law, given to the plaintiff to sue thereon at any time within twenty years. It was an accrued right. The general repealing clause of section 47 is, it seems to us, modified by section 50, so that it does not affect the right of action on judgments where the right of action accrued before the repealing act took effect. That the right to bring an action is a right "accruing or accrued," within the meaning of the statute under consideration, see *McDonald v. Jackson*, 55 Iowa, 37. The reasoning of that case is also in line with our view. In that case it was claimed that the effect of the statute of limitations, as enacted in the Code of 1873, was to extend the time for bringing an action on the note to ten years after the act took effect, where a part of the statutory period had run, as in this case. Speaking to the question of a right being affected under the provisions of section 50, it is there said: "Now, if the Code of 1873 is to extend the period of the statute of limitations to ten years from the taking effect of the Code, it is apparent that the right accruing or accrued is affected. The right of the holder of the note is enlarged and the right of the maker of the note is abridged. Under section 50 of the Code, this cannot be done." The reasoning is applicable to this case. If the repealing clause of the Code of 1873 is to change the law as to the right of the judgment creditor to bring suit, by arresting the operation of the law under which the judgment was taken, the effect is to enlarge or

abridge his rights, and the same is true as to the rights of the judgment debtor. It seems to us that an object of section 50 was to avoid such results, and leave the rights of parties to the operation of the law under which they accrued. The claim of appellee is that the effect of the change made in the law by the Code of 1873 is to extend the limitation period made on the judgment,—that is, the time in which suit may be brought on the judgment,—to thirty-five years from its date, instead of twenty years, and we hardly need say that, if such a claim is sustained, the rights of the plaintiff are enlarged, and those of the defendants are abridged. We conclude that the judgment in question is not affected by the provision of the Code of 1873 to the effect that actions shall not be commenced on judgments rendered in courts of record within fifteen years from the rendition thereof, and that a cause of action thereon is barred.

Counsel in argument have considered the effect of *Weiser v. McDowell*, 93 Iowa, 772, in which we held that, because of the provision of the Code of 1873 giving a right of action on judgments only after the expiration of fifteen years from the date thereof, the statutory period did not commence to run till the cause of action accrued. Appellee urges that the case is authority for his contention here, but we think not. It is true that in that case the judgment was entered before the Code of 1873 was adopted, but the question on which this case turns was not presented or considered in that case. The judgment sued on in that case was entered in November, 1871, and the defendant, who pleaded the statute of limitations, stated in his answer that "no action could have been brought on said judgment at any time prior to the 8th of November, 1886"; and the case was submitted and considered as one in which no right had accrued before the Code of 1873 took effect, but as a

case unaffected by section 50 of that Code, which section we hold to be controlling under the facts relied on in this case. We are referred by appellee to authorities to the effect that the statute of limitations in force at the time the remedy is sought is the one to apply. We do not by our holding contravene that rule. We have simply determined what the effect of the statute in force is. The period of limitation was the same before the Code of 1873 as after. It is simply a question whether section 2521 of that Code suspended a right of action on a judgment where the right had already accrued, so that the statute of limitations did not commence to run for fifteen years. It is thought that there is no vested right under a statute of limitations until the period fixed has fully run and the bar is complete; nor is our holding against such a rule. We do not say that the right to bring an action in a given time is a vested right, in a legal sense. We need not determine that question. What we do say is that it is a right contemplated by section 50, and not to be affected by the repealing clause of the Code. It is a question of statutory construction to know the legislative purpose. The legislative authority to so make the law could not well be questioned, and we simply hold that it did so make it. The judgment is REVERSED.

ALVERSON & HAMILTON V. THE ANCHOR MUTUAL FIRE
INSURANCE COMPANY, Appellant.

Appeal: CHANGE OF VENUE: *review*. Refusal of an application for
1 a change of place of trial, on which the affidavits were in con-
2 flict, on the ground of the prejudice of the people of the county
against the defendant, as shown by comments in newspapers, will
not be disturbed on appeal where it appears that such comments
were designed for political effect rather than otherwise, and that
there was no abuse of discretion.

REVIEW: evidence. No question for the consideration of which the
3 evidence is necessary can be considered on appeal where the evi-
5 dence has not been so preserved that it is part of the record.

Rule applied. In an action on a policy of insurance covering notions,
groceries and hardware, and providing against keeping of gun-
3 powder, petroleum, coal oil and celluloid the issues were as to the
5 right of the insured to keep such prohibited articles for sale in
certain small quantities, as he did. An instruction was given
that if those prohibited articles were generally included and car-
ried by dealers of groceries, hardware and notions, the policy
would not be void. This instruction, and the admission of evi-
dence on that issue, were assigned as error, but no part of the
evidence was in the record. *Held* that, under such condition of
the record, these questions could not be considered.

Offers and rulings. Statements in the abstracts on appeal, in the
nature of conclusions as to what took place on the trial as to
offers and rulings on evidence will not be considered where the
record is entirely silent in regard thereto.

Appeal from Davis District Court.—HON. F. W. EICHEL-
BERGER, Judge.

THURSDAY, APRIL 7, 1898.

ACTION on a policy of fire insurance. Judgment for
plaintiff, and defendant appealed.—*Affirmed.*

S. S. Carruthers and Sullivan & Sullivan for
appellant.

Payne & Sowers and Traverse & Taylor for
appellee.

GRANGER, J.—I. The trial of this cause com-
menced April 9, 1896. During the vacation preceding,
the defendant presented an application for a change of
place of trial because of the prejudice of the people of
Davis county, which application was supported by affi-
davit. From a showing for the change of place of trial,
it is made to appear that the persons constituting the
plaintiff firm, Alverson & Hamilton, had been jointly

indicted on a charge of having burned the building and the stock of goods, or a part thereof; that a defense in this case is that at least a part of the property was destroyed by fire by the wilful and fraudulent acts of the plaintiff; that Alverson was tried on the indictment in Davis county, which trial occupied some ten days of time, in which some one hundred and forty witnesses were examined, about one hundred and twenty of whom resided in Davis county; that the cost of the trial was about four thousand dollars; that the trial attracted quite a general public interest in the county, many people being in attendance; that the newspapers 1 of the county made comments as to the trial, and the cost of it. There was a verdict of not guilty, and certain exhibits to the application are copies of articles published after the trial, in which the facts and proceedings are somewhat detailed, with a statement that the county attorney was being censured for having pushed the case for trial at the time he did, and on the evidence he presented. In one paper stress was placed on the matter of costs to the county, that might have been avoided had the case not been pressed for trial before the civil suits to recover on the policies of insurance, in which the same question would be presented. The other paper took a contrary view of the matter, claiming that the statements as to costs and the conduct of the county attorney were untrue; that the record showed the costs to be somewhere near one thousand, two hundred and fifty dollars, and justified the acts of the county attorney. It appears that these papers had a circulation of about eight hundred copies each in the county, and that they were distributed from every post office therein. Besides these exhibits are affidavits in support of the application, to the effect that the defendants could not have a fair trial in Davis county, because of the prejudice of the inhabitants. These affidavits

recite what the affiants have seen and heard, and the conclusion that such a prejudice exists. Of these there are seven or eight. A counter showing makes it appear that the population of the county is in excess of fifteen thousand, and that there are two thousand, three hundred and sixty-four persons in the county subject to duty as jurors. It also appears from the affidavits of some thirty or more persons residing in different parts of the county, who are entirely disinterested, that there is no prejudice existing in the county against the defendant. This conclusion is based on the facts stated, that they had not heard any of the inhabitants of the county talk about the case, and they did not know themselves that there was such a case pending in Davis county until they were asked to sign the affidavits. We do not overlook the fact that these affidavits are limited in scope to knowledge or talk of this particular case; and of course there might be prejudice against the company

because of the criminal suit, even though there
2 was no knowledge of the civil suit. But reliance is largely placed on the papers creating prejudice in the remote parts of the county. The articles in the *Bloomfield Democrat* are the ones that must have created the prejudice, if it existed. The articles in that paper make especial reference to the civil suit pending, and make it a prominent feature touching the costs to the county thought to have been unnecessarily made. These affidavits are quite conclusive proof that the papers had not reached the inhabitants of the county, so as to create a general prejudice; for they could not have been read generally, and so many persons, from so many localities, have been ignorant of so prominent a fact in the publications. It is further to be said that the contrary expressions and conclusions of the two papers would go far to allay, rather than to create, prejudice. The two papers seem to have general circulation, and a reader of the articles would quite readily

conclude that they were designed more for political than for other effect. It is not practicable to represent the record fully, for there are many detail facts favorable to both sides. It is, however, to be said that the question of prejudice is clearly one of fact for the court below. We think the showing preponderates against a conclusion of prejudice, but, were it otherwise, we could not interfere, in the absence of abuse of discretion. It should be stated that the hearing on this question was before Hon. Robert Sloan, who did not preside at the trial.

II. The policy covered, among other things, notions, groceries, hardware, and all other goods, not more hazardous, kept for sale in a retail country store. It contained a provision against keeping numerous articles, and among them, gunpowder, petroleum, coal oil, or celluloid. The issues were so made that the plaintiff attempted to justify the keeping of such articles in the manner they were kept. On this branch of the case the court gave the following instruction: ("13) One of the defenses made in this case is that the policy is void because the plaintiffs had in their stock of goods articles prohibited by the policy; that is, gunpowder, coal oil, and celluloid. The policy prohibits the carrying of said articles in stock without the written consent of the company. The policy, in its written provisions, covers and includes groceries, hardware, and notions. If you find from the evidence that the amount of powder, petroleum, coal oil, or celluloid carried by the plaintiffs was small in quantity, and in such amounts only as are generally and usually carried by country general stores, and also find from the evidence that such articles, so carried, are generally and usually included by the trade, and by wholesale and retail dealers, in the terms, 'groceries,' 'hardware,' or 'notions,' then and in such case

the policy would not be void." It is urged that this instruction is erroneous, and also that the rulings
3 by which evidence was admitted to show that the articles prohibited might be kept were erroneous. No part of the evidence taken on the trial is in the record. Appellant, in its abstract, states that evidence was introduced by both parties on the issue as to the keeping of such articles; that objections were made by the defendants, overruled by the court, and exceptions taken. These statements in the abstract make it appear that plaintiff was permitted to show a general custom of merchants to keep gunpowder in quantities of twenty-five pounds, and to keep coal oil for sale, and that coal oil and petroleum were included in the term "hardware and groceries." These questions
4 cannot be considered under the condition of the record. The statements, in the abstract, of what took place on the trial as to offers and ruling on evidence, must be disregarded, because they are matters as to which the record is entirely silent. If such conclusions would ever be proper in an abstract, they
5 should be made from the record, so as to be justified by it. The evidence used on the trial below has never been preserved of record so that it is a part of the record on appeal, and can in no way be considered, nor can any question for the consideration of which the evidence is necessary. This has been so many times held that we need not refer to authorities. It is true that the instruction refers to evidence in a way to indicate there was evidence on that particular issue, but what it was, or how it came into the case, does not appear, except from the unauthorized statements in the abstract which we cannot consider. It may have been admitted by consent, or without objection. We do not presume against the action of the court below, but in support thereof. The judgment will be AFFIRMED.

STATE OF IOWA V. J. H. MATEER, Appellant.

Liquor Nuisance: NOTICE TO OWNER. Under Code, 1873, section

- 1 1558, as amended by Acts Twenty-first General Assembly, chapter
66, section 12, providing that the premises used for illegal sale of
liquors with the knowledge of the owner thereof, shall be liable
for all fines, costs, and judgments incurred thereby, one who owned
a building for two months immediately preceding the finding of
the indictment, during which time intoxicating liquors were kept
and sold therein, is charged with knowledge of the use it was
put to.

Action: LIQUOR NUISANCE: Parties. The owners of property on
which a liquor nuisance is maintained, who have sold the same,
8 are not necessary parties to an action under Code, 1873, section
1558, as amended, to subject such property to a judgment rendered
on account of keeping such nuisance, as the demand for relief is
against the property instead of such former owners.

Limitation of Action: STATUTE PENALTY: Liquor Nuisance. An
6 action under Code, 1873, section 1558, as amended, to subject real
estate to a judgment rendered on account of a liquor nuisance, is
not within section 2529, providing that actions "for a statutory
penalty," cannot be brought after two years from the time the
cause of action accrues.

ESTOPPEL. Delay in prosecuting an action to subject the premises
4 wherein liquors were sold in violation of law to the payment of
the fines and costs, will not estop the state from obtaining the
relief demanded, where the property changed hands several times
during the pendency of the action, and the state was unable to
obtain service of process on the owners.

Lis pendens. A purchaser of land during the pendency of an action
2 to subject it to a judgment rendered on account of a liquor nu-
isance cannot claim protection as a purchaser in good faith with-
out any actual knowledge of the pendency of the action where all
5 the requirements of the statute for giving constructive notice of
the rights of the state have been met, under Code, 1873, section 2628,
providing that when a petition has been filed affecting real estate,
the action is pending so as to charge third persons with notice of
its pendency, and during such pendency no rights can be acquired
by third persons.

SAME. The filing of a petition in an action by the state to subject the
8 premises wherein liquors were sold in violation of law to the pay-

ment of the fine and costs incurred by the seller, which alleged that the judgment was rendered on account of unlawful sales carried on on the premises, that defendants claimed to own or have an interest therein, and which requests a lien, is sufficient to apprise third persons of the rights of the state and of the relief demanded.

Costs: GOVERNOR'S REMISSION. The governor has no power to remit
7 or suspend the collection of the costs awarded against the defend-
9 ant on the trial of an indictment for keeping a liquor nuisance.

FINES. An order by the governor suspending the further execution of
8 a specified judgment for maintaining a liquor nuisance because it
is represented that the defendant's health is in such a condition
that further confinement will endanger his life, does not operate
as a remission of the fine imposed on defendant, although it will
prevent, during such suspension, the maintenance of an action
under Code, 1873, section 1558, to subject the real estate to the
payment of the judgment for the amount of such fine.

Appeal from Mahaska District Court.—HON. A. R.
DEWEY, Judge.

THURSDAY, APRIL 7, 1898.

ACTION in equity to subject certain real estate to
a judgment rendered on account of a liquor nuisance.
There was a hearing by the court, and a decree in favor
of the state, from which the defendant, J. H. Mateer,
appeals.—*Modified and affirmed.*

W. H. Keating and L. C. Blanchard, for appellant.

Byron W. Preston for the state.

ROBINSON, J.—On the tenth day of October, 1891,
Shorty Hawkins was charged by indictment with the
crime of nuisance committed by keeping for sale and
selling on the premises in controversy intoxicating
liquors in violation of law. In April, 1892, he was
tried, and found guilty of the offense charged, and
adjudged to pay a fine of seven hundred dollars and the
costs of prosecution. The judgment also provided that
he stand committed to the jail of Mahaska county until

the fine and costs should be paid. Hawkins was imprisoned for a time, but was released under order of the governor of the state, which, in terms, suspended the further execution of the judgment. When Hawkins was released, he had become entitled to a credit on account of the fine, of sixty-three dollars and fifty cents. Hawkins did not own the premises in controversy, and this action was commenced on the twenty-first day of May, 1892, to subject the premises to the payment of the judgment, Frank Peters, J. H. Stubenrauch, and H. M. Van Vliet being made parties defendant. The property was at one time owned by Isabelle McNeilan, but on the seventh day of August, 1891, she conveyed it to Stubenrauch, by a deed which was recorded on that day. On the tenth day of the same month Stubenrauch conveyed the premises to Peters by a deed which was recorded on the fifth day of the next month. On the fifteenth day of August, 1891, Peters conveyed the premises to Annis Milner, and the deed of conveyance was recorded on the twenty-seventh day of June, 1892. On the third day of May, 1893, Mrs. Milner conveyed the property to the defendant, J. H. Mateer. On the day the deed to Mrs. Milner was recorded, the plaintiff filed an amendment to its petition, making her and her husband parties defendant; and on the sixteenth day of July, 1894, a second amendment, making Mateer a defendant, was also filed. None of the defendants named, excepting Mateer, were served with notice of the action, and he alone appeared to it. The district court found that he was the owner of the premises, and that he purchased them while this action was pending, and charged with notice of the rights of the plaintiff. A decree was accordingly rendered subjecting the premises to the payment of the judgment against Hawkins.

I. This action was brought under the provisions of section 1558 of the Code of 1873, as amended by section 12 of chapter 66 of the Acts of the Twenty-first General Assembly, which are as follows: "For all fines and costs assessed, or judgments rendered against any person for any violation of the provisions of this chapter, * * * the personal and real property, except the homestead and the personal property of such person which is exempt from execution, as well as the premises and property, personal or real, occupied and used for the purpose, with the knowledge of the owner thereof or his agent, by the person manufacturing or selling or keeping with intent to sell intoxicating liquors contrary to law, shall be liable; and all such fines costs and judgments shall be a lien on such real estate until paid.

* * *

1 It is contended that the state has failed to show that any of the sales by Hawkins were made with the knowledge of the person who owned the premises when the sales were made, or within the knowledge of his agent; and we think that is true with respect to all owners of the property prior to the time the indictment was found, excepting Annis Milner. She owned the property from the fifteenth day of August, 1891, until the third day of May, 1893, and therefore was its owner for nearly two months immediately preceding the finding of the indictment, and the evidence is ample to show that during all of the time last mentioned intoxicating liquors were kept and sold in the property in violation of law, and that Mrs. Milner must be charged with having knowledge at that time of the true character of the business which was being carried on.

II. Section 2628 of the Code of 1873 is as follows: "When a petition has been filed affecting real estate, the action is pending so as to charge third persons with notice of its pendency, and while pending no interest can

be acquired by third persons in the subject-matter thereof as against the plaintiff's title, if the real property affected be situated in the county where the petition is filed." The petition in this case was properly filed

2 and duly indexed, and thus gave notice to all persons of the right of the state to have the judgment against Hawkins established as a lien on the property in controversy. Some claim is made to the effect that the petition and its amendment did not show who was the owner of the property while Hawkins was maintaining the nuisance; but we do not think there were any defects in that respect of which the appellant can take advantage. The petition showed the judgment against Hawkins; that it was rendered on account of the unlawful keeping for sale and selling of intoxicating liquors; that the unlawful business was carried on in the property in controversy; that a lien therefor was asked against the property, and that Mrs. Milner and other persons named claimed to own or have an interest in it. The averments were ample to apprise third persons of the rights of the state and the relief

3 demanded. It is said that the persons who owned the property while this nuisance was being maintained were necessary parties to the action, but, as the demand for relief was against the property, and not for a personal judgment against its owner, unless for costs in case the demand was resisted, there was no necessity for making any person excepting the owner of the property at the time of the trial a party to the action. It is true that the petition and amendment thereto named several persons as owners, or as interested in the property, but at the time of the trial Mateer was the sole owner, and the only one the state was compelled to make a party defendant; and he was given the opportunity to make defense to the action. See *Buckham v. Grape*, 65 Iowa, 535; *Shear v. Green*, 73

Iowa, 688. There is much reason for concluding that an attempt was made by persons interested, to conceal the ownership of the property. Some of the grantees in the chain of title we have set out were non-residents of the state, and notice of the action was not served on them for that reason. Mrs. Milner's interest in the property was unknown to the state until the deed to her was recorded, and soon after that time she disappeared, and notice was not served upon her because the state did not know where she could be found. The appellant's ownership was not known to the state until the time when he was made a party to the action, and notice was served on him two days later. It may be that
4 greater diligence could have been exercised by the state in the prosecution of the case, but, in view of the circumstances which tended to justify delay, we do not think the failure of the state to prosecute the case with greater diligence is sufficient ground for denying to it the relief it demands. The appellant claims
5 that he purchased the property in good faith, without any actual knowledge of the pendency of this action; but all the requirements of the statute to give constructive notice of the rights of the state had been met, and the fact that he did not have actual knowledge of the action is not a defense.

III. It is claimed that this action is barred by that part of section 2529 of the Code of 1873, which provides that actions "for a statute penalty" cannot be brought after two years from the time the cause of action
accrued. This is not an action to recover a statute penalty, within the meaning of that provision, but is founded upon a judgment. The
6 fact that the judgment was rendered for a penalty authorized by statute does not limit the time within which this action could have been commenced, in two years.

IV. We are next required to determine the effect of the order of the governor, to suspend the execution of the judgment. The order contains the following: "I, Horace Boies, governor of the state of Iowa, in
7 the name and by the authority of the people thereof, do hereby suspend the further execution of the judgment of the district court of Mahaska county [describing the judgment in controversy]. This suspension is granted because it is represented to me by the county physician of Mahaska county that defendant's health is in such a condition that further confinement will endanger his life. The governor of the state may at any time, and especially upon violation of any of the foregoing conditions, summarily revoke this instrument, and direct the execution of the sentence as aforesaid." This was dated July 8, 1892, and, acting under it, the sheriff discharged Hawkins. The governor of this state has power "to grant reprieves, commutations, and pardons, after conviction," and to "remit fines and forfeitures," under such regulations as may be prescribed by law. Constitution, article 4, section 16. Section 4712 of the Code of 1873 provides that "the governor shall have power to remit fines and forfeitures upon such conditions and with such restrictions and limitations as he may think proper." That the governor had the power, under these provisions, to remit the fine in question, is not controverted, but there is nothing in the language of the order which we have quoted to show that the governor intended to remit the fine. In that respect it differs from the order considered in *Harbin v. State*, 78 Iowa, 263. At the time the order in question was issued, the judgment was being executed by confining Hawkins in the county jail. The order was not an unconditional remission, but a suspension of the "further execution" of the judgment, and was granted because of the representations

that further confinement would endanger the life of Hawkins. The order shows that it was granted because of the representations made respecting the effect to be apprehended from prolonging his confinement, but the order was not limited to suspending so much of the judgment as required imprisonment. The order was comprehensive in its terms, and included the entire judgment, and we are not authorized to so construe the language used as to limit it to imprisonment.

8 That it was within the power of the governor to grant a conditional suspension of the judgment is settled by the adjudications of this court. *Arthur v. Craig*, 48 Iowa, 264; *Harbin v. State*, 78 Iowa, 263; *State v. Beebee*, 87 Iowa, 636. We conclude, therefore, that, as a revocation of the governor's order is not shown, the bringing of this action, so far as it related to the fine imposed on Hawkins, is at least premature, and that the right to maintain it as to such fine has not, for that reason, been established. But this is not

9 true with respect to the costs. The governor had no power to remit them, nor to suspend their collection. *State v. Beebee*, *supra*; *Estep v. Lacy*, 35 Iowa, 419. The costs taxed against Hawkins amounted to the sum of one hundred and seventy-nine dollars and fifty cents, including an attorney's fees of forty dollars. It is said, however, that under the rule in the *Beebee Case* no recovery can be had in this action for an attorney's fee. The *Beebee Case* was unlike this, but whether it is an authority against the right of the governor to suspend the collection of the attorney's fee taxed as costs against Hawkins we need not determine, for the reason that no right to recover that fee appears to be claimed by the state. Its argument on that point is obscure, but we understand it to say, in effect, that a receipt for the fee has been given, and that nothing is asked on account of it. For that reason it will be deducted from

the amount of costs for which judgment was rendered. A decree will be rendered in favor of the state for the costs remaining after deducting the attorney's fee, and establishing a lien therefor on the premises in controversy. The decree of the district court is MODIFIED AND AFFIRMED.

GEORGE PARKINS V. GEORGE ALEXANDER, Appellant.

Infants: JUDGMENT: Jurisdiction. A justice's judgment in an action
1 by a minor in his own name, although it may be erroneous, is not
void under Code 1873, section 2565, providing that the action of a
minor "must be brought by his guardian or next friend."

SUBSTITUTION OF NEXT FRIEND: Appeal. Under Code, 1873, section
2 2565, providing that the action of a minor must be brought by his
guardian or next friend, but giving the court power to substitute
his guardian or another person as a next friend; and section 2639,
relating to proceedings in district court allowing the addition or
striking out of the name of a party,—a district court can, in an
action begun by a minor in justice court in his own name, and
appealed, substitute his next friend as plaintiff.

Appeal from Taylor District Court.—HON. W. H. TED-
FORD, Judge.

THURSDAY, APRIL 7, 1898.

ACTION at law commenced in justice's court. A judgment was rendered by that court in favor of the plaintiff; an appeal was taken; and the judgment was affirmed by the district court. The defendant appeals.—*Affirmed.*

Jackson & Miller for appellant.

L. T. McCoun and *J. R. Plummer* for appellee.

ROBINSON, J.—This cause is submitted for our consideration on a certificate of the trial judge, which shows the following facts: "The plaintiff is a minor, and

commenced this action in his own name. The defendant pleaded in justice's court, in abatement, that the plaintiff was a minor, and had not legal capacity to maintain this action in his own name. The plaintiff, in reply, admitted that he was a minor, but stated that he had been emancipated by his father and given his time, and therefore had capacity to sue in his own name. Judgment was rendered against the defendant for \$40 and costs, and he appealed to the district court. He asked that court, by motion, to dismiss the plaintiff's cause of action, and to sustain the plea in abatement; and, by agreement, the question whether the action should be abated was submitted to the court on the pleadings. The defendant's motion was overruled, and, on the application of the plaintiff, his father, as next friend, was substituted as plaintiff. Judgment was thereafter rendered affirming that of the justice's court.

The questions certified for our determination are as follows: "(1) Could the court substitute a next friend for the minor, and thus acquire jurisdiction on appeal, after the suit had been commenced in the name of the minor? (2) Does our statute authorize the court to permit the plaintiff to amend and bring in a next friend after he has commenced a suit in his own name, and after appeal?"

Section 2565 of the Code of 1873 is as follows: "The action of a minor must be brought by his guardian or next friend; but the court has power to dismiss it, if it is not for the benefit of the minor, or to substitute the guardian of the minor or other person as next friend." It is contended by the appellant that the minor has no capacity to sue; that an action cannot under any circumstances be commenced by him; and that the requirement of the statute that his action must be brought by his guardian or next friend is mandatory. It is urged,

further, that the appearance of a guardian or next friend is jurisdictional; that, in the absence of such appearance, a court cannot acquire jurisdiction of the cause of action of a minor; and that in this case the district court did not acquire jurisdiction by appeal. The common law capacity of a minor to transact business for himself has been somewhat enlarged by our statute. At common law the contracts of a minor, excepting for necessities, did not, as a rule, bind him unless he affirmed them after attaining his majority. *Wright v. Germain*, 21 Iowa, 585; *Murphy v. Johnson*, 45 Iowa, 57. But, under the statute of this state, he is bound by his contracts unless he disaffirms them within a reasonable time after he attains his majority. Code 1873, section 2238. Where a contract for the personal services of a minor is made with him alone, payment to him for services rendered according to the terms of the contract is a full satisfaction for the services rendered. *Id.* section 2240. It is the theory of the law that a minor is not competent to maintain and protect his own interests in court. *Cavender v. Smith's Heirs*, 5 Iowa, 193. Hence the rule has been established that he must be represented in proceedings in court by his guardian or next friend. The rule is primarily for the benefit of the minor; but interested persons may, in proper cases, insist upon the observance of the rule for their own protection. It is not true, however, that a court can acquire jurisdiction of a minor only through his guardian or next friend. Section 2566 of the Code of 1873 provided that "the defense of a minor must be by his regular guardian, or by a guardian appointed to defend him where no regular guardian appears. * * * No judgment can be rendered against a minor until after a defense by a guardian." In the case of *Drake v. Hanshaw*, 47 Iowa, 291, which arose under that section, it was shown that a minor had appeared by

an attorney in an action in justice's court, but was not represented by guardian. After verdict, he moved in arrest of judgment, on the ground that he was a minor; but the motion was overruled, and judgment was rendered against him, and no appeal was taken. The case cited was commenced to enjoin the enforcement of the judgment, and to annul it. This court held that the justice's court had jurisdiction of the defendant and the subject-matter of the action, and also held that the failure to appoint a guardian was a mere irregularity; that the judgment was not void, and must be regarded as in force until set aside by proper proceedings at law. See also, *Milne v. Van Buskirk*, 9 Iowa, 558; *Myers v. Davis*, 47 Iowa, 330; *Hoover v. Plow Co.*, 55 Iowa, 668; 10 Enc. Pl. & Prac. 596. The actions and proceedings considered in those cases were against minors, and minors over fourteen years of age might have been brought into court by service of notice on them alone; but, notwithstanding that fact, we think the rule which governed in the cited cases is applicable to actions brought by minors. Certainly, there is as much reason for applying it to actions voluntarily commenced by minors as to those in which they are made defendants without volition on their part. Whether the justice's court erred in not sustaining the plea in abatement, or in not requiring the substitution of the minor's guardian or next friend, are questions not before us; but we are of the opinion that it had jurisdiction of the minor, and that it had jurisdiction of the subject-matter of the action is not questioned. Therefore, although its judgment may have been erroneous it was not void, and the district court acquired jurisdiction of the cause by appeal.

Section 2689 of the Code of 1873 refers to proceedings in district courts, and provides that "the court may, on motion of either party at any time, in furtherance of

justice, and on such terms as may be proper, permit
 such party to amend any pleadings, or proceed-
 2 ings by adding or striking out the name of a
 party, or by correcting a mistake in the name of a
 party, or a mistake in any other respect or by insert-
 ing other allegations material to the case, or, when the
 amendment does not change substantially the claim or
 defense, by conforming the pleadings or proceedings
 to the facts proved." Justice was certainly promoted
 by permitting the substitution as plaintiff of the minor's
 next friend. The substitution did not change the claim
 of the plaintiff, nor affect the right of the defendant to
 make defense, and was fully authorized by the section
 quoted. *Adae v. Zangs*, 41 Iowa, 540; *Clow v. Murphy*,
 52 Iowa, 695; *Type Foundry v. Medes*, 60 Iowa, 525;
Boos v. Dulin, 103 Iowa, 331. It is not accurate to say
 that the district court acquired jurisdiction by the sub-
 stitution of the minor's next friend as plaintiff; but, so
 far as the questions certified are properly framed, they
 are answered in the affirmative, and the judgment of the
 district court is **AFFIRMED**.

**EDGAR CARTER V. J. H. BARLOW, Sheriff of Keokuk
 County.**

Courts: JURISDICTION: Boundary line crimes. The county which
 first acquires by proper proceedings, jurisdiction of the person in
 1 case of a crime committed within five hundred yards of a county
 line retains such jurisdiction to the end, under Code, 1873, section
 4160, providing that when a public offense is committed within
 that distance of the boundary line of two or more counties the
 jurisdiction is in either county.

Appeal: HABEAS CORPUS. A claim on *habeas corpus*, as to a
 crime charged to have been committed on the boundary line of
 2 two counties, the crime charged against the petitioner in one
 4 county was that from the crime charged in the indictment
 against him in another county cannot be considered on an appeal
 by him from the judgment in the *habeas corpus* proceedings, where
 the petition recites that the charge in each case was for the same

offense and there is nothing to contradict such recital except a transcript which cannot be considered.

REVIEW. An amended abstract setting out a copy of the indictment returned by the grand jury against the petitioner in *habeas corpus* proceedings is properly before the court, on appeal from the judgment in such proceedings, where it was made a part of the petition by reference and was considered by the trial court

SAME. An amended abstract filed by the appellee in an appeal from a judgment in *habeas corpus* proceedings by one who sets up that he is illegally restrained under an indictment found in one county, because a county having concurrent jurisdiction had previously acquired jurisdiction, which purports to contain a transcript of the proceedings of the latter county, showing a dismissal of the case in such county the day the *habeas corpus* proceedings was heard, cannot be considered where the case was decided on a demurrer to the petition, as such transcript was not before the trial court at the time of the hearing.

Appeal from Keokuk District Court.—HON. A. R. DEWEY, Judge.

THURSDAY, APRIL 7, 1898.

THIS is a *habeas corpus* proceeding, in which plaintiff alleges that he is illegally restrained of his liberty by the defendant, who as sheriff of Keokuk county, is holding him under and by virtue of a bench warrant issued by the district court of Keokuk county. The trial court remanded the petitioner, and he appeals.—*Reversed.*

Slater & Hunt for appellant.

F. L. Goeldner and D. W. Hamilton for appellee.

DEEMER, C. J.—On the twenty-fourth day of November, 1896, appellant was arrested upon a warrant issued by a justice of the peace of Iowa county on the charge of having committed a public offense in Keokuk county, but within five hundred yards of the county line. A hearing was had, and he was bound over to await the action of the grand jury of Iowa county.

Subsequent to this the grand jury of Keokuk county found an indictment against him for the identical offense that he had been held to answer for by the magistrate of Iowa county. A bench warrant issued, and defendant was arrested upon the indictment, and, at the time of filing his petition, was in the custody of the sheriff. He claims that as the committing magistrate of Iowa county first took jurisdiction of the offense, and held him to answer to the grand jury of that county, that the district court of Keokuk county had no jurisdiction of him, or of the offense with which he was charged. Section 4160 of the Code of 1873 provides that "when a public offense is committed on the boundary of two or more counties, or within five hundred yards, the jurisdiction is in either county."

1 Jurisdiction over the person and of the offense, under the showing made in this case, was in either Iowa or Keokuk county. It seems to be well settled, however, that in such cases the county which first acquires jurisdiction of the person by proper proceedings retains that jurisdiction to the end. As said by this court in the case of *Ex parte Baldwin*, 69 Iowa, 502: "The court first obtaining jurisdiction of the person of the accused shall retain it, to the exclusion of the court of the other county, and shall proceed to try the case and administer justice therein." Further it is said: "The court first acquiring authority over the accused, by his arrest, or by otherwise obtaining custody of his person through its officers, first acquires jurisdiction." Application of these familiar rules to the case at bar clearly demonstrates that the courts of Iowa county first acquired jurisdiction; that they should retain it to the end, and to the exclusion of the district court of Keokuk county; and that appellant should not be subjected to the peril of two trials. The question presented arises upon a demurrer to the petition, based upon the

ground that the correctness of the action of the grand jury in finding the indictment cannot be questioned by *habeas corpus* proceedings. Appellee has filed
2 an amended abstract, which purports to contain a transcript of the proceedings of the district court of Iowa county, showing a dismissal of the case in that county on the day that the *habeas corpus* proceeding was heard. As the case was decided upon a demurrer to the petition, this transcript cannot be considered, as it is clear it was not before the trial court at the time this proceeding was heard, and was not a part of the record; so that it could have been considered even if it had been before it.

The amended abstract also sets out a copy of the indictment returned by the grand jury of Keokuk county. This is properly before us, for the reason that it was made a part of the plaintiff's petition
3 by reference, and was undoubtedly considered by the trial court. Appellee's contention that the proceedings in the Iowa county district court were a part of the record, and were incorporated into the petition by reference, is not sustained.

It is further argued in support of the ruling of the trial court that the appellant was held to answer to the grand jury of Iowa county for the crime of an assault with intent to commit a great bodily injury, and was indicted by the grand jury of Keokuk county for the offense of an assault with intent to murder; that
4 the offenses are not the same; and that under the rule announced in *State v. Foster*, 33 Iowa, 525, the district court of Keokuk county had jurisdiction. A sufficient answer to the argument is that it is based upon an erroneous assumption. The petition recites that the charge in each case is for the same offense, and there is nothing to contradict this save the transcript to which we have referred, which cannot be

considered. The court was in error in sustaining the demurrer upon the record before it, and its judgment is REVERSED.

STATE OF IOWA V. JAMES T. HAYES, Appellant.

Evidence: SEDUCTION. A finding that defendant charged with seduction of a girl seventeen years old made use of seductive arts, is sustained by evidence that he was on very friendly terms with
 2 the prosecutrix; that she was intimate with his family, and that at the time of the alleged seduction he put his arm around her and began to coax and flatter, and told her that it would not hurt her to have intercourse with him.

Conflict: APPEAL. In a prosecution for seduction, where prosecu-
 1 trix had been delivered of a child, and the evidence whether defendant had had sexual intercourse with her was conflicting, she affirming and he denying it, the verdict against him will not be disturbed.

CORROBORATION. Corroboration of prosecutrix' statement that
 8 defendant committed the seduction may be found in the relation of the parties and the attending circumstances.

INSTRUCTIONS. Though prosecutrix, on rebuttal, stated the date on
 4 which she had intercourse with the defendant a week earlier than on her first examination, an instruction that the particular day was not material, provided the seduction occurred within eighteen months before the indictment, is not objectionable as justifying the jury in inferring that defendant's evidence, tending to show that he was not with prosecutrix at the time first stated by her, was immaterial and incompetent.

Appeal from Scott District Court.—HON. P. B. WOLFE,
 Judge.

THURSDAY, APRIL 7, 1893.

DEFENDANT was indicted, tried, and convicted of having, on the twenty-eighth day of October, 1894, feloniously seduced and debauched one Charlotte Kelly, an unmarried woman, of previously chaste character. Judgment was entered against him that he pay a fine of one thousand dollars, and be imprisoned in the

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105	82
115	172

county jail for a term of one day; also for costs. Defendant appeals.—*Affirmed.*

Davison & Lane and *Emmett M. Sharon* for appellant.

Milton Remley, attorney general, and *Ambrose P. McGuirk* for the state.

GIVEN, J.—I. Appellant's first contention is that the evidence does not support the judgment. There is no question but that the prosecutrix was, at the time of the alleged seduction, an unmarried woman, of previously chaste character. The contentions are whether the defendant had sexual intercourse with her with her consent, and whether her consent was procured by artifice, promise, flattery, or deception on the
1 part of the defendant. That some man had sexual intercourse with the prosecutrix about the time alleged is placed beyond question by the fact that she was delivered of a child on the twenty-second day of July, 1895. The evidence is conflicting as to whether the defendant had sexual intercourse with the prosecutrix, she affirming and he denying that he did. We will not discuss the evidence upon this proposition. It is sufficient to say, under it we are not warranted in disturbing the finding of the jury that the defendant did have sexual intercourse with the prosecutrix, with her consent, about the time charged in the indictment.

II. Appellant's further contention is that the evidence fails to show that consent was procured by artifice, promise, flattery, or deception on his part. In *State v. Fitzgerald*, 63 Iowa, 268, it is said: "There is no legal standard by which to determine what false promises, artifices, and deception are sufficient to constitute the crime of seduction. Of course, mere unlawful

commerce for a consideration paid is not seduction. There must be some artifice or false promise by which the virtuous female is induced to surrender her person to the accused. What would be sufficient to overpower the mind of one woman would be insufficient to lead away another of more mature mind and discretion." In that case the defendant was a married man, aged about fifty years, and the prosecutrix about twelve. In this case the defendant was a widower, thirty-eight years of age, and the prosecutrix a girl of seventeen. The defendant's family consisted of himself, a young lady sister, who kept house for him, and his four children. The prosecutrix resided with her parents near by, attended the high school, and was a frequent visitor at the defendant's home. There is no dispute but that on a Sunday evening, about the latter part of October, 1894, the prosecutrix started from defendant's home to go to the house of a friend, and that the defendant walked with her. She testifies that the defendant had sexual intercourse with her that evening, on the steps of an unlighted church; that, upon reaching the street that led to her friend's house, she was about to turn into that street, when the defendant said, "Come over to Perry street, and I will go with you;" whereupon they
2 passed onto Perry street, and to the steps of the church. She further testifies as follows: "He said, 'Let's go up and sit down on the steps.' So we went up there. While up there, at first he put his arm around me, and then began to coax and flatter and say things. Then he asked me if I had ever had intercourse with anybody. I told him, 'No,' and he said 'Well, it won't hurt you.' He began to ask me, and I said 'No' at first. And he said: 'No; it won't hurt you. This has been done before,' Then he talked awhile, and he says, 'Come up back here on the steps, and lie down,' and I did it. And then I didn't remember anything until then

it just come to me that I had been to holy communion, and I said, 'Oh! I have been to communion this morning;' and then he got up, after he had succeeded in having intercourse." The court instructed to the effect that if the prosecutrix voluntarily, and in response to mere solicitations or persuasions, and without flattery or artifice on his part, submitted to intercourse with the defendant, it would not be seduction under the law. "In order to make out the crime charged in the indictment, it must be shown that the consent of said Charlotte Kelly to the sexual act was procured by the defendant through some artifice or flattery on his part. If you find that the defendant, by his language and conduct towards the prosecutrix, flattered her, and by such flattery induced her to submit her person to the gratification of his sexual desires, such an act on his part would be a seductive artifice, within the meaning of the law." No complaint is made of this instruction, and thereby the question whether consent was secured by seductive artifice was fully and fairly submitted to the jury. While, as to a woman of mature years, it might be questioned whether the acts proven showed seductive artifice, we think that, because of the tender age of the prosecutrix, the relation of the parties, and all the attending circumstances, the jury were warranted in finding that consent was induced by seductive arts. Such conversation, caressing, and false assurances coming from a friend of defendant's age and experience to a girl of seventeen may well be held to constitute seductive arts. *State v. Bollerman*, 92 Iowa, 460, cited by appellant, is quite different in its facts from this case. In that case the evidence showed an entire absence of consent. More nearly in point is the case of *State v. Higdon*, 32 Iowa, 262.

III. Appellant further contends "that there is an entire absence of corroborating testimony required

by the statute." In pursuing this inquiry, we may assume, because of what is already stated, that the crime of seduction was committed, and the inquiry is whether there is evidence tending to corroborate the prosecutrix in her statement that the defendant committed it, or, in other words, tending to connect the defendant with the commission of the crime. Authorities are cited to the effect that evidence of opportunity and of the birth of the child do not constitute such corroboration. The jury was properly instructed upon this subject, and the question of corroboration

3 submitted to them. The corroboration is to be found, not in any one particular fact, but in the relation of the parties and the attending circumstances, as disclosed in the evidence. We will not discuss these circumstances, but content ourselves with saying that they present such corroboration as that we would not be warranted in disturbing the verdict because of an absence of corroborating testimony.

IV. The court instructed that it was not material to the case that the seduction occurred on the particular day named by the prosecutrix, provided that it did occur within eighteen months prior to the finding of the indictment, September 14, 1895. Appellant does not question the correctness of this instruction as an abstract proposition, but insists that it was prejudicial to him, in view of the state of the evidence as to when the alleged crime

4 was committed. The prosecutrix testified on her first examination that the intercourse on the church steps was on the evening of the fourth Sunday of October, 1894. She also testified that the defendant had sexual intercourse with her on the next Sunday afternoon, at his house, where she had stopped on her way going to vespers. The defendant introduced evidence tending to rebut the evidence that he was with the prosecutrix on the evening of the fourth Sunday of

October, and that she was at his house on her way to vespers the next Sunday evening. Prosecutrix was called in rebuttal, when she testified as follows: "Yes; I have an explanation to make as to dates. I have got the two dates that I had intercourse with Mr. Hayes mixed up. The second Sunday that I had intercourse with him was the twenty-eighth of October, 1894, and the Sunday before, on the twenty-first, was the first time, and was the time that we walked to the Congregational church, on the twenty-first of October, 1894; and the Sunday after this second intercourse was the Sunday Mrs. Morgan brought home the little girl Ella." Appellant insists that the jury was justified in inferring from the instruction that his defense as to the time was not competent or material, and that the fact proven by him that intercourse could not have taken place at the time stated by the prosecutrix was not material. We do not think the instruction could be so understood. It simply directed the jury that the crime need not be proven to have been committed on the day alleged, and that it was sufficient if it was proven to have been committed within eighteen months prior to the finding of the indictment. The defense as to time went to the question as to whether the crime had been committed by the defendant, and the jury must have so understood from all the instructions. Appellant seems to have had a full and fair trial, and, in our opinion, the findings of the jury on each element of the alleged crime has such support in the evidence as that, under a familiar rule, we should not disturb the verdict.—AFFIRMED.

WATRRMAN, J., takes no part.

LILLY SEILER, *et al.*, MINORS BY THEIR NEXT FRIEND,
Appellees, v. THE ECONOMIC LIFE ASSOCIATION
OF CLINTON, IOWA, Appellant.

Insurance: COPY OF APPLICATION. The attachment to an insurance policy of a copy of the application, followed by the word "signed,"

105	87
108	122
108	123
108	124
105	87
115	492
105	87
119	222
105	87
139	142
139	374
105	87
144	230

1 but without the signature of the applicant, does not entitle the
 2 company to rely on any part of such application, under Acts
 3 Eighteenth General Assembly, chapter 311, section 2, providing
 that all insurance companies shall on the issue of any policy
 attach thereto "a true copy" of any application and that if it neg-
 lects to do so it shall be forever precluded from pleading, alleging
 or proving such application or any part thereof.

FORFEITURE: *Suicide.* Where a life insurance policy contains no
 2 stipulation as to suicide and is taken out in good faith, it is not
 4 avoided, as against a *beneficiary* named therein, by the fact that
 assured, while sane, purposely took his own life.

Instructions: **HARMLESS ERROR.** An instruction that fraud might
 be proved by circumstances from which the inference of fraud is
 5 *irresistible* is harmless, where it is so qualified by succeeding
 instructions that the party seeking to prove fraud could not be
 prejudiced.

Same. Error in giving instructions, or refusing the defendant the
 6 opening and closing, is harmless, where the case might have been
 taken from the jury.

Appeal from Clinton District Court.—HON. P. B. WOLFE,
 Judge.

FRIDAY, APRIL 8, 1898.

PLAINTIFFS sue to recover insurance upon the life of
 one Joseph Seiler, deceased. Two actions were brought,
 each upon a different policy. The actions were consoli-
 dated in the trial court. Defendant made one answer
 to the two claims, as combined. There was a trial to
 a jury, verdict and judgment for plaintiffs, and
 defendant appeals.—*Affirmed.*

Hayes & Schuyler for appellant.

Calvin H. George for appellees.

WATERMAN, J.—The undisputed facts in the case
 are that the defendant company issued to one Joseph
 Seiler the two policies in suit, numbered, respectively,
 17,146 and 17,147. By these policies the life of said
 Seiler was insured for the benefit of the plaintiffs in the

sum of two thousand dollars; each policy being for the sum of one thousand dollars. Both of these policies were issued upon a single application. This
1 application was signed, "Joseph Seiler"; and a copy thereof, with the exception that the signature was omitted, and in its place appeared the word "Signed," was attached to policy No. 17,146. No copy or purported copy of the application was attached to policy No. 17,147, but there was an indorsement thereon in these words: "For copy of application, see policy No. 17,146, issued to same party." The policies were taken out on the thirty-first day of August, 1895; and, on the seventh day of October following, Seiler committed suicide. The policies contained no provision in relation to suicide, but there was this clause in the application, "I also warrant and agree that I will not die by my own act, whether sane or insane, during the period of three years following the date of the issue of the policy for which application is hereby made."

II. Defendant, in its answer, sets up, in one paragraph, that Seiler, while in a sound mental condition, took his own life. This was demurred to by plaintiffs, and the demurrer sustained, to which defendant excepted. No question is made as to the propriety of thus attacking by demurrer a paragraph in a pleading. It was alleged by defendant in another paragraph of its answer that Seiler, with the intent to defraud defendant company, procured it to issue said policies; he at the time intending to take his own life, as in fact he shortly thereafter did. This matter was also assailed by a demurrer, which was overruled. Evidence was introduced upon this branch of the case, and this single issue of fact was submitted to the jury.

III. The appellant assigns fifty-nine errors. We think the matters can be condensed under five heads: (1) Was the application a part of policy No. 17,147, to

which neither a copy or a purported copy was attached?

(2) Was it a part of policy No. 17,146, to which
2 was attached a copy that omitted the signature
of the applicant? (3) Will the suicide of the
assured operate to avoid, as against a beneficiary named
therein, a policy which does not in terms except death
in that manner from the risk assumed? (4) Did the
trial court err in its instructions? (5) Had the appel-
lant the right to open and close before the jury?

IV. Taking up the questions in the order of stat-
ing them, we shall devote no time to the first, for it will
be disposed of by what we have to say under the next
head.

V. Attached to policy No. 17,146 was a copy of
the application made by the assured, except, as already
said, that the signature of the applicant was omitted,
and in the space where his name appeared in the
original was the word "Signed." The trial
3 court refused to permit the introduction in evi-
dence of this application, when offered by defend-
ant as part of the contract. This ruling, we take it,
was based on the provisions of section 2, chapter 211,
Acts Eighteenth General Assembly, the material por-
tions of which we set out: "All insurance companies
or associations shall, upon the issue or renewal of any
policy, attach to such policy, or endorse thereon, a true
copy of any application or representations of the
assured, which, by the terms of such policy, are made
a part thereof, or of the contract of insurance, or
referred to therein, or which may in any manner affect
the validity of such policy. The omission so to do shall
not render the policy invalid, but if any company or
association neglects to comply with the requirements
of this section, it shall forever be precluded from plead-
ing, alleging, or proving such application or representa-
tions, or any part thereof, or falsity thereof, or any parts

thereof, in any action upon such policy. * * *

This section has been often construed. For a quite recent exposition of its meaning we refer to *Goodwin v. Society*, 97 Iowa, 226. It is argued on behalf of the appellant that all of the statements and representations made by the assured were in the copy that was attached to the policy, and that he could not have been prejudiced by the omission of his signature, for he must have known that he signed the original. But it seems to us that the very purpose of the statute was to avoid, so far as possible, any dispute as to the assured's knowledge of the contract. The requirement is that a copy of the application shall be attached. We do not understand this to call for a *fac simile*, but it certainly demands at least a substantial reproduction of the instrument. The signature is an essential part of the application, and all that is essential in the original should appear in the copy. It will be noted that in the alleged copy it is not stated by whom the original is signed. In Wisconsin they have a statute which is the counterpart of the one under consideration, and in *Dunbar v. Insurance Co.*, 72 Wis. 492 (40 N. W. Rep. 386), it was held that a copy of the signature of the applicant was essential, in order to make a copy of the application, within the meaning of the law. The case was, in its facts, like the case at bar, except that the blank for the signature in the copy contained nothing to indicate that any signature was appended. The court, in speaking on the subject, says: "We are of the opinion that the copy of the application attached to the policy, not having the copy of the name of the applicant appended thereto, cannot be said to be a copy of such application, within the meaning of the statute. The signature is the thing which gives force to the application, and, when signed with knowledge of its contents, is conclusive on the insured. * * * We think that the

signature of the party to an instrument which receives its vitality solely from such signature is such a substantial part of it that a copy of it must contain such signature." As having some bearing, we also cite *Kyser v. Railway Co.*, 56 Iowa, 207. The trial court was right in holding that the application in this case was no part of the contract, and that the statements therein could not be given in evidence.

VI. The defense of suicide was set up in two forms. In one, as we have said, it went to the jury. The paragraph of the answer to which the demurrer was sustained was as follows: "That the said Joseph Seiler on or about the 7th day of October, 1895, and while in same mental condition, and able to understand the moral character and consequences of his act, committed suicide, and intentionally and purposely
4 killed himself, by shooting." The question thus presented by the ruling on the demurrer is: If a policy of insurance on life, containing no stipulation as to suicide, is taken out in good faith by the assured, will it be avoided, as against a beneficiary named therein, by the fact that the assured thereafter, while sane, deliberately and purposely took his own life? The authorities are not many on the subject, and they are not seriously in conflict. While there are a number of cases in which something has been said upon this matter in the way of *dicta*, there is but one in which it has been expressly decided that the suicide of the assured, if sane, will avoid a policy that contains no provision of forfeiture in such case, and that is *Ritter v. Insurance Co.*, 18 Sup. Ct. Rep. 300, decided at the October term, last, of the federal supreme court. The opinion in this case in the circuit court of appeals appears in 17 C. C. A. 537, and 70 Fed. Rep. 954. This last citation is given because we shall have occasion to refer to this opinion in the course of what we shall say. It was held in the

Ritter Case that there could be no recovery on a policy of insurance by the executor of one who, while sane, intentionally took his own life, even though the policy contained no clause of forfeiture because of such act. We think that case is readily distinguishable from the case at bar. In the *Ritter Case* the action was brought by the personal representative of the assured, whose claim had to be made through the wrongdoer, while here the suit is instituted by beneficiaries named in the policy, and who claim in their own right. An investigation will disclose that the distinction we make is material, and supported by authority. In *Moore v. Woolsey*, 4 El. & Bl. 243, the policy contained a stipulation avoiding it, as far as regarded the executors and administrators of the assured, if he died by his own hand, but leaving it in force to the extent of any interest acquired by a third person. The plea was that the assured had committed suicide. Replication that one Kettle, before the death of the assured, had acquired by assignment an interest in the policy. Upon these issues, Lord Campbell, delivering the opinion, said: "If a man insures his life for a year, and commits suicide within the year, his executors cannot recover upon the policy, as the owner of a ship, who insures her for a year, cannot recover upon the policy if within the year he cause her to be sunk. A stipulation that in either case upon such an event the policy would give a right of action would be void." This is the language quoted in the *Ritter Case*, and it was *obiter* only. But Lord Campbell said something more, and something not only pertinent to the issues before him, but that has direct application to the matter we are considering. He continues: "But, where a man insures his own life, we can discover no illegality in a stipulation that if the policy should afterwards be assigned, *bona fide*, for a

valuable consideration, or a lien upon it should afterwards be acquired, *bona fide*, for a valuable consideration, it might be enforced for the benefit of others, whatever may be the means of his death. * * *

The supposed inducement to commit suicide under such circumstances cannot vitiate the condition, more than the inducement which the lessor may be supposed to have to commit murder should render invalid a beneficial lease granted for lives. When we are called upon to nullify a contract on the ground of public policy, we must take care that we do not lay down a rule which may interfere with the innocent and useful transactions of mankind." If public policy does not stand in the way of a recovery by an assignee, we can discern no reason why it should in the case of a beneficiary named in the contract. It may be said that the assignee spoken of is one whose claim rests upon a consideration paid. To this we would say that the claim of the beneficiary is also based upon a consideration paid by the assured. If it should further be said that public policy does not bar a recovery by the assignee because the interests of creditors furnish little or no motive for the self-destruction of the assured, our answer would be this: The motives for suicide are manifold and varied. An inquiry as to what inducement is most likely to impel one to the act is profitless, for any rule of law that would prevent a recovery by these plaintiffs would operate in like manner against a mere creditor, if he were the beneficiary named. And, further, we might call attention to the *Ritter Case*, in which the assured admittedly sacrificed his life for the benefit of his creditors. In the opinion in the *Ritter Case* in the circuit court of appeals it is said: "In the cases brought to our attention where suicide during sanity, by the person whose life was insured, was held not to be a valid defense, the policy was issued for the benefit of some

other person, or an independent interest, by assignment or otherwise, had been acquired by a third person." Here is the distinction plainly made. So, also, in the opinion of Mr. Justice Harlan on appeal, we think the same idea is expressed. In commenting on an expression used in another case, he says: "This observation was irrelevant to the case before the court, and cannot be regarded as determining the point in judgment. If it was meant there could be a recovery by the personal representative, * * * we cannot concur in that view." Another and a convincing reason for thinking that the doctrine announced in the *Ritter Case* was not intended to go further than to deny a right of recovery to the personal representatives of the assured is that no one of the several cases in which beneficiaries named in the contract have been held entitled to recover was mentioned in that opinion. We shall now refer to these cases: *Fitch v. Insurance Co.*, 59 N. Y. 559, is the first. Suit was brought by the widow, to whom the policy was payable. The contract contained no clause avoiding it in case of suicide by the assured. One defense tendered was that the assured took his own life. Evidence to sustain it was excluded by the trial court. In affirming this ruling the court of appeals says: "The policy contained no stipulation that it should be void in case of the death of the insured by suicide. It was not taken out for the benefit of Fitch, but of his wife and children. Although they were bound by his representations, and any fraud he may have committed in taking out the policy, the policy having been obtained through his agency, yet they were not bound by any acts or declarations done or made by him after the issue of the policy, unless such acts were in violation of some condition of the policy." *In Darrow v. Society*, 116 N. Y. 537, (22 N. E. Rep. 1093), the plaintiff was the beneficiary under the contract. The assured committed suicide. There was a provision in the policy

that it should "be void if the member herein shall die in consequence of a duel, or by the hands of justice, or in violation of, or an attempt to violate, any criminal law of the United States, or of any state or country in which the member may be." Held that, suicide not being a crime in New York, the condition of the policy was not violated, and the plaintiff could recover. *Kerr v. Association*, 39 Minn. 174 (39 N. W. Rep. 312), is a case similar in principle to the last. The same holding in favor of a beneficiary has been made by this court in *Goodwin v. Society, supra*. The policy sued upon there provided for its forfeiture in the event of suicide within two years, and by its express terms it was incontestable after that time. After the lapse of that period the assured took his own life. The policy was issued to the wife. In an action by her, we held she could recover. Now, if suicide is a risk that the company is forbidden, by considerations of public policy, to take, it could not have been held as within the agreement not to contest; for, if a contract to insure as against the risk of suicide is void, the waiver here must have been invalid, and the defense should have been sustained. The question was brought directly to the attention of the court in argument, as appears from the language of the opinion. These are the cases which we have been able to find. We wish now to add a few words on principle, by way of emphasis of a thought already expressed. It is not the wrongdoer who makes claim here, nor any representative whose rights are to be measured by those of the wrongdoer, but persons who acquired an interest at the time the policy was taken out, and who are not in any way responsible for the loss under it. The defendant might well have guarded against this contingency in its contract. Not having done so, we think it is now in no position to complain.

VII. Error is assigned on the refusal of the trial court to give instructions asked by defendant. Fifteen

instructions were asked. We need not set them out. We find that the charge, as given, fully covered the case.

VIII. Instruction No. 7 of the court's charge is complained of. In this paragraph the jury was told that fraud was not to be presumed, but, like any other fact, might be proved by circumstances "from
5 which the inference of fraud is natural and irresistible." It is the use of the word "irresistible" to which objection is made. The word is certainly not well chosen, but it is qualified to such an extent by the instruction next following that its employment could not have prejudiced defendant. We might very well
6 put our rulings on the instructions on another ground. We have carefully read the testimony offered by defendant to establish the fact that, at the time he took out these policies, Seiler intended to commit suicide, and thus defraud defendant; and we find nothing in it to support any such claim. The trial court might with propriety have taken the case from the jury.

IX. What has just been said disposes of defendant's contention that it was entitled to open and close. If error was committed by the trial judge in this matter,—which we by no means hold,—it was wholly without prejudice. The judgment below will be AFFIRMED.

JOHN L. SLOAN, Appellant, v. W. H. DAVIS and LEVI KECK, Defendants, *et al.*, Interveners.

Compounding felony: ADULTERY: Public policy. By an agreement for the settlement of a civil action for seduction, plaintiff was to
7 destroy all the evidence in his possession or under his control,
8 which would tend to prove or connect defendant with the acts charged or claimed to have been done by him. It appeared from the agreement that no criminal prosecution was intended by the parties having the right to prosecute. *Held*, that, as the prosecution of the plaintiff's wife was at the option of her husband, and
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that of the defendant at the option of his wife, the principle of public policy does not apply, as in cases where the prosecution may be otherwise instituted.

Contract: CONSIDERATION. The settlement of an action for the 5-6 seduction and the alienation of the affections of plaintiff's wife is 10 sufficient consideration for money paid and notes given by defendant to secure such settlement

Written compromise: LAW QUESTION. An agreement showed on its face that it was intended as a settlement of a civil action, and 5 contained no reference to a criminal prosecution. *Held*, that, the 8 consideration of the settlement was not, as a matter of law, the 9 compounding of a felony, nor contrary to public policy.

Appeal: WAIVER OF RULES. A motion to modify and waive the rules in regard to certification of the evidence in an equitable action, under supreme court rule, section 90, providing that when by reason of peculiar circumstance the rules relating to the abstract, 2 preparation and argument of causes ought to be waived or modified, such modification or waiver may be granted upon proper application, will be refused where neither the shorthand notes nor 3 he extension thereof were ever certified by the trial judge as required by Code, 1873, section 2742. The terms of the rule do not include *authentication*.

EVIDENCE: Review. Alleged error in admitting or excluding evidence 4 cannot be considered on appeal where the evidence is not in the record.

SAME. The ruling of the trial court in denying a motion to correct the record so as to show that the extension of the shorthand notes 1 was properly certified by the judge and the reporter cannot be reviewed by the supreme court where the motion was heard on affidavits and oral testimony taken in open court, and the evidence is not before the supreme court.

TRANSCRIPTS: Statutes. The amendment of the Code of 1873, section 3179, by Acts Twenty-sixth General Assembly, chapter 64, providing that the translation of the original notes of the shorthand 3 reporter, certified by him to be correct, shall constitute a part of the record, and shall be sent up in its original form, in lieu of the transcript of the evidence, is limited to said section 3179, and does not, by implication or otherwise, repeal section 2742, which requires all the evidence taken in equitable causes to be certified by the judge within the time allowed for the appeal.

Appeal from Jackson District Court.—HON. W. F. BRANNAN, Judge.

FRIDAY, APRIL 8, 1898.

ACTION in equity to enjoin the delivery and collection of three promissory notes executed by plaintiff to defendant Davies, and placed in the possession of defendant Keck, and to cancel the same; also, to recover two thousand dollars, money paid by plaintiff to defendant Davies. The ground alleged for this relief is that said money was procured to be paid, and said notes to be executed, without consideration, and by false and fraudulent pretenses and representations and duress. Defendant Davies answered, denying said alleged grounds for relief, and asking judgment on one of said notes. Defendant Keck, for want of information, denies said alleged grounds for relief, and disclaims any interest in the matter in suit. Johnson & Kelsey intervened, claiming to own one of said notes, and asking judgment thereon. Murray & Farr also intervened, claiming to own another of said notes, and asking judgment. Plaintiff replied, denying that interveners were owners of said notes, and denying the right of either of said parties to judgments on said notes. Decree was rendered September 10, 1896, dismissing plaintiff's petition, and judgments were rendered against him on each of said promissory notes in favor of the defendant Davies and each of the said interveners. Plaintiff appeals.—*Affirmed.*

D. A. Wynkoop and L. A. Ellis for appellant.

W. C. Gregory and Hayes & Schuyler for appellees.

GIVEN, J.—I. Several motions are submitted with the case; the first to claim our attention being appellees' motion to strike from appellant's abstract that

part purporting to set out the evidence, on the ground that neither the shorthand notes of the evidence, nor any translation or extension thereof, were ever certified

to by either the official shorthand reporter or the
1 judge who tried the case. In support of this

motion, appellees filed a certificate of the clerk

of the district court, made May 17, 1897, to the effect that what purported to be the shorthand notes of the evidence were filed in his office December 28, 1895; and

that the appearance docket shows that the extension or transcript of said notes was filed on the second day of December, 1896. He certifies that upon examination of

said documents he finds that neither bears any certificate of the reporter or of the judge, nor any certificate

whatever. Appellant, in resistance to said motion, filed

the affidavit of D. A. Wynkoop, one of his attorneys, and

the affidavits of several persons who assisted Mr.

Wynkoop in preparing the abstract, to the effect that

at the time the abstract was prepared the extension of the shorthand notes of the evidence did bear the certificate

of the reporter and judge attached thereto, and their belief that the same had in some manner become

detached. Appellant also filed the affidavits of several

others as to statements made by the reporter to the

effect that he and the judge had certified the notes and

extension. Appellant having filed his motion in the

district court to correct the record so as to show that

the extension of the shorthand notes was properly certified

as of December 2, 1896, by the judge and the

reporter, the case was continued in this court pending

said motion. The motion was heard in the district court

December 7, 1897, "on affidavit and oral testimony

taken in open court," and overruled. We are not called

upon to review this ruling, nor could we do so, as we

have not the evidence before us upon which the ruling

was based. We must therefore accept it as an adjudicated fact that neither the shorthand notes nor the extension thereof were certified by either the reporter or the judge within six months from the rendition of the decree and judgments. Appellant shows, in denial of appellees' additional abstract, that at a date which does not appear, but which was evidently long after the expiration of six months, the reporter did certify the shorthand notes. It is manifest, however, that neither the shorthand notes nor the extension thereof were ever certified by the judge. Pending this motion to strike the evidence, appellant moved this court to modify and waive the rules in regard to certification of the evidence in this case, upon several grounds. This motion is based upon section ninety of the rules of this court, which provides, "When, by reason of peculiar circumstances, the foregoing rules relating to the abstract, preparation and argument of causes, ought to be waived or modified in any case," such modification or waiver may be granted upon proper application.

2 It will be observed that this provision relates to the preparation of the abstract and argument, and not to the authentication of the record. This motion to waive or modify the rule is based largely upon said affidavit, tending to show that the shorthand notes and translation thereof were properly certified; but, as we have seen, it has been judicially determined that such was not the fact. This motion of appellant must be overruled, and we now proceed to consider appellees' motion to strike, in the light of the statute and rules. Section 3173, Code 1873, provides that appeals may be taken to this court "at any time within six months from the rendition of the judgment or order appealed from, and not afterward." Section 2742 requires that evidence in equitable actions shall be taken in writing, and "all the evidence so taken shall be

certified by the judge at any time within the time allowed for the appeal of said cause, and be made a part of the record, and go on appeal to the supreme court which shall try the cause anew." Section 3179, as amended by chapter 35, Acts Twenty-second General Assembly, after providing how appeals should be perfected, provided as follows: "But no transcript of the record need be forwarded to the supreme court until a denial of appellant's abstract of the record has been served, and if no denial shall be made no transcript of the record shall be required." This section was further amended by chapter 64, Acts Twenty-sixth General Assembly, as follows: "And the translation of the original notes of the shorthand reporter certified by him to be true and correct shall constitute a part of the record, and shall be sent up in its original form in lieu of a transcript thereof, when a transcript of the evidence is required, and shall be returned to the clerk of the proper county after the cause has been determined by the supreme court." Appellant's contention is that by this amendment it is only required that the translation of the evidence be certified by the reporter, and that such certification need not be made within the time allowed for an appeal. The amendment is expressly limited to section 3179, and, we think, was intended simply to avoid the labor and expense of transcribing the translation of the notes of the evidence by providing that the original translation, certified by the reporter, should be sent up, instead of a copy thereof by the clerk. This provision does not, by implication or otherwise, repeal the provision of said section 2742, which requires that all the evidence taken in equitable causes shall be certified by the judge within the time allowed for the appeal. See *Blanchard v. De Voe*, 80 Iowa, 521; *Chapel v. Wadsworth*, 85 Iowa, 742. Our conclusion is that appellant's motion to modify the rules

must be overruled, and that appellee's motion to strike that part of the abstract purporting to set forth the evidence must be sustained.

II. Appellant presents twenty-three assignments of error, all of which, except the first eight, are unquestionably grounded upon rulings on the evidence; and, as the evidence is not before us, they cannot be
4 considered. Defendant Davies, in his answer, sets out the stipulation of settlement of a case wherein he was plaintiff, and the plaintiff, Sloan, was defendant, and which stipulation is as follows: "In the District Court of Jackson County, Iowa. W. H. Davies, Plff., vs. John L. Sloan, Deft. Stipulation of
5 Settlement. Whereas, on the 17th day of February, 1894, the above-named plaintiff did begin an action against the defendant herein for the sum of twenty thousand dollars, as damages for the seduction and alienation of his wife's affections; and whereas, on the same day the same defendant, John L. Sloan, did in the presence of Wm. Graham, accept due and legal service of the said notice, which notice is hereunto attached and made a part hereof on the same 17th day of February: Therefore it is hereby agreed and stipulated that for the purposes of avoiding public discussion of the truth or falsity of said charge, and in full satisfaction and settlement of the said demand and suit, and in payment in full of all damages claimed, or claimed to have been sustained, by the said W. H. Davies, because of the said alleged act or acts of this defendant, this defendant shall pay to the plaintiff herein the sum of five thousand dollars (\$5,000), in manner and form as follows, to wit: The sum of two thousand dollars (\$2,000) in cash, and shall execute his individual notes in favor of the plaintiff,—one in the sum of seven hundred and fifty dollars (\$750), due in two years from this date, and bearing interest at six per cent. per annum,

payable annually; one for seven hundred and fifty dollars (\$750), due in two years from this date, and bearing six per cent. interest per annum, payable annually; and one for fifteen hundred dollars (\$1,500), due in three years, and bearing six per cent. interest per annum, payable annually. And it is further stipulated and agreed that this stipulation, together with the three above-described notes, shall be placed in the hands of Levi Keck, as custodian, upon the following conditions, to wit: That said Levi Keck shall hold the said notes until their maturity: provided, however, that if the annual interest shall not be paid, when due, to said Levi Keck, then and in that event he shall deliver the said notes to the owner or owners thereof. And it is further provided that, if said owner or owners shall at any time desire to bring action upon said notes, then the said Keck shall furnish to the said owners copies thereof, to attach to their petition or petitions, and shall produce the originals in court, as evidence, when required so to do; and, after the payment of said notes in full, then the said Keck shall destroy this stipulation, without at any time furnishing any person a copy thereof, or without making or retaining one himself, or permitting one to be made. And it is further agreed on the part of the plaintiff hereto that he will deliver to, or destroy in the presence of, the defendant or his attorney, all evidence or evidences which he may have in his possession or under his control, or under the control of his attorneys which may tend to prove or connect the defendant with the acts charged or claimed to have been done by him in said suit, save and except only certain letters claimed to have been written by the wife of the plaintiff to the defendant, which letters, it is agreed, shall remain in the possession of G. L. Johnson so long as the same may be required to be used as evidence in a divorce proceeding between the plaintiff herein and his wife, after

which time the said letters shall be destroyed in the presence of the defendant or his attorneys. In witness whereof, we have hereunto set our hands and signatures this tenth day of March, 1894. Johnson & Kelsey, Murray & Farr, Attys. for Plff. A. L. Bartholomew and Wm. Graham, Attys. for Deft." Appellant's

6 first eight assignments of error are that the court erred in the following particulars: In holding that the consideration for the settlement was a valid consideration for the notes in question, and in sustaining said settlement. In not holding that said agree-

ment is an agreement to compound a felony, and
7 in holding that it was not contrary to the statute, and void. In not holding that it was a contract

to conceal, suppress, and destroy the evidence of Sloan's adultery, and therefore contrary to public policy and void, and in not holding the agreement was an agreement to stifle a public prosecution, and

8 therefore void. The agreement shows upon its face that it was an agreement for the settlement

of the civil action of Davies against Sloan, then pending. It contains nothing whatever with respect to a criminal prosecution. Plaintiff, Sloan, being then a married man, Davies could not prosecute him criminally for adulterous intercourse with his wife. His redress was simply by a civil action. See *State v. Oden*, 100 Iowa, 22; *State v. Mahan*, 81 Iowa, 121. By the agreement Davies was to deliver or destroy all evidence in his possession, or under his control, "which may tend to prove or connect the defendant with the acts charged or claimed to have been done by him," excepting letters written by Mr. Davies' wife to the defendant, which were to be preserved for the purpose of a divorce proceeding against Mrs. Davies. The prosecution of Mrs. Davies being entirely at the option of her husband, and the prosecution of the plaintiff, Sloan, being entirely at

the option of his wife, the principle of public policy does not apply, as in cases where prosecutions may be otherwise instituted. As matters stood, it does not seem at all probable that a criminal prosecution was intended by either of the parties having a right to prosecute, and it is evident that this agreement of settlement

was prompted in part, at least, by a desire to
 9 avoid the publicity that would have attended the trial of that civil action. We do not think it can be said as a matter of law, that the consideration for that agreement of settlement was the compounding of a felony, or contrary to public policy. We
 10 think the settlement of the pending action was a sufficient consideration for the money paid and the notes given by Sloan to Davies. It follows from the conclusion announced that the judgment of the district court must be affirmed.—AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY V.
 PETER KELLEY, B. A. DOLAN, WILLIAM BALLIN-
 GER, WILLIAM KIEL, TREASURER, and JOHN
 MENZ, DEPUTY, Appellants.

Railroads: TAXATION: Presumptions. A tax deed to land owned by a railroad company will not be held invalid, under Code, 1873, sections 1317, 1319, on the ground that it was used exclusively for
 6 railroad purposes and assessed by the executive council of the state, merely because the land was so returned by the company, when it does not appear that it was ever assessed by the executive council, as under section 897 there is a presumption that the tax deed was based on a valid assessment, and under prior sections, the executive council is not concluded by the return of the railroad company but may reject property as not coming within the provisions of such section.

NAME OF OWNER. An assessment of land to the "C., B. & Q. Ry" is not sufficient to show that the land is assessed to the Chicago,
 8 Burlington & Quincy Railway Company in the absence of proof that it was, at the time, commonly known by such abbreviation.

106	108
112	331
106	106
117	60

105	106
130	293

106	106
e134	3

105	10
135	408

Tax sale: REDEMPTION. The owner of land, having tendered the
 7 amount paid by a purchaser at a tax sale, with interest and penalties, will be required to pay the same in order to redeem, though the tax deed is set aside as void.

NOTICE. One in actual occupancy of part of a lot of land and holding
 2 the title to all of it must, under Code, 1873, section 894, be served
 4 with notice before a tax deed to the land can be executed.

SAME. That the assignee of a certificate of a sale of land for taxes
 2 takes possession of part of the land and begins quarrying there-
 4 from does not deprive the owner of the land, who is in actual occupancy of another part, of his possession of such part, nor relieve the former of the necessity of notifying such owner. under Code, 1873, section 894, before obtaining a tax deed to the land.

Limitation of actions. The statute of limitations does not begin to
 5 run in favor of the grantee in a tax deed of land, where the deed was issued without serving notice on the person in whose name the land was taxed or on the person in possession of the land.

Partition: JUDGMENT. One to whom lots bounded by a designated street are awarded in partition proceedings, takes land on the opposite side of the street to the high-water mark of the Missis-
 1 sippi river, subject, only, to the easement for street purposes, where the report of the commissioners which is confirmed by a decree of the court states that the lots upon such street include all the land in front of them, to such river.

Appeal from Lee District Court.—HON. A. J. McCrary,
 Judge.

FRIDAY, APRIL 8, 1898.

ACTION to quiet the title of lot 1, in block 8, in the city of Keokuk. Decree as prayed, and defendants appeal.
 —*Modified and Affirmed.*

Bernard A. Dolan for appellants.

H. H. Trimble, Palmer Trimble, Jas. C. Davis and A. Hollingsworth for appellee.

LADD, J.—The title to lot 1, in block 8, in the city of Keokuk, was in the heirs of one Hine, in 1869, who conveyed the same to the plaintiff in 1882. Their title,

however, had been divested by a tax deed executed to George B. Dennison, November 4, 1874, and later by a tax deed executed to W. B. Collins, April 21, 1881. Collins conveyed the land to the plaintiff in 1882. Unless the title so acquired by the plaintiff has been lost by the tax deeds under which the defendant Kelley claims, it is entitled to the relief sought. We may then give our attention to these deeds. The land in controversy was a portion of the "Half-Breed Tract" partitioned in 1839. The report of the commissioners indicates that Water street extends along the meander line of the Mississippi river, and that all town lots "are bounded by the middle of the street and alleys upon which they are situated, and the lots upon Water street also include all the land in front of them to the Mississippi river." This report was confirmed by a decree of the district court of Lee county in October, 1841. The lot, as it appears on the plat, is one hundred feet on High street, by fifty on Water street, and is back 200 feet from the high-water mark. The evidence shows that a strip of 66 feet wide along the east line of the lot as platted is Water street, and the remainder of the land down to high-water mark, being about 134 feet, has been continuously occupied by the plaintiff since prior to 1882. Its freight depot, main line of road, and five switches have been there during this period, and, until the last few years, its passenger depot also. That the portion of land between the plat line and the high-water mark is a part of the lot admits of no doubt. It is expressly made so by the partition proceedings referred to. While Water street is within the city limits, the interest of the public therein is similar to that in any ordinary highway, being an easement only. The fee is in the abutting lot owners, in whom is also that to the high-water mark of the Mississippi river. *Haight v. City of Keokuk*, 4 Iowa, 212; *Barney*

v. City of Keokuk, 94 U. S. 336. In *Barney's Case* it is said: "The original proprietors in dedicating Water street reserved the title to the soil in the street, and this title went with the several tracts fronting on the street and extended to the Mississippi river." In *Haight's Case*, Woodward, J., remarked: By this decree of partition among the proprietors, those fronting on the river in like manner own the land—the fee—to the river." But the lot as platted, 50 feet by 100 feet, lies on a precipitous bluff composed of limestone, and was never actually occupied until 1892, when Kelley began quarrying limestone there, which work he prosecuted to some extent up to the time this action was begun. While the plaintiff actually occupied only that portion near the river, its deed from Collins conveyed the entire lot.

II. For the year 1884 this lot was assessed to unknown owners, and, the tax remaining unpaid, was sold to William Ballinger in December, 1885. Notice was served January 5, 1889, on J. F. Pollock, general agent of the Chicago, Rock Island & Pacific Railway Company, that Ballinger would take a tax deed, and this he did procure May 4th, following, from the
2 treasurer of Lee county. On January 8, 1892,

Ballinger assigned the certificate of sale on which the deed had been issued to Peter Kelley, who on November 16, 1892, served notice on Ballinger, to whom the land was assessed that year, that unless redeemed within 90 days a tax deed would issue. On January 7, 1895, the treasurer executed a tax deed to Kelley, purporting to correct the one previously issued to Ballinger. The tax list of 1888 and 1889 shows this
3 lot to have been assessed under the name of the "Owner" to the "C., B. & Q. Ry.," and under the heading "Remarks" appeared in lead pencil, "Taxed by executive council." Notice of the expiration

of the right to redeem must be served upon the person in possession and him in whose name the land is taxed, before the tax deed may be executed. Code 1873, section 894. The initials "C., B. & Q. Ry." did not indicate that plaintiff was intended. *Accola v. Railway Co.*, 70 Iowa, 189. Nor did the evidence show that, at or prior to the time the tax deed was executed to Ballinger, it was commonly known and customarily referred to by that abbreviation. The evidence introduced related to the time of trial, and does not bring the case within the rule of *Anderson v. Railway Co.*, 93 Iowa, 561.

4 Neither Pollock nor the Chicago, Rock Island & Pacific Railway Company was in possession. But the plaintiff was in actual occupancy of a large portion of the lot, and held the title to all of it. If in possession of any part of it, a notice was required under the statute. *Bradley v. Brown*, 75 Iowa, 180; *Callanan v. Raymond*, 75 Iowa, 307; *Shelley v. Smith*, 97 Iowa, 259; *Garmoe v. Sturgeon*, 65 Iowa, 147; *Crawford v. Liddle*, 101 Iowa, 148. The same is true of the deed to Kelley. The notice was served on the person in whose name the land was taxed, but not on the plaintiff. That Kelley began quarrying some time during the same year did not deprive the company of the possession of the lower portion of the lot, nor relieve him from the necessity of notifying it before obtaining its property by tax deed. There is some evidence tending to show that the road and depot were the property of the Keokuk & St. Paul Railway Company, but, as possession was in the plaintiff, we make no inquiry as to such ownership. *Bradley v. Brown*, *supra*.

III. Defendant asserts that this action cannot be maintained because more than five years intervened between the execution of the deed to Ballinger and the beginning of the action. Code 1873, section 902.

5 The statute of limitation does not begin to run when the deed is issued without notice being served on the person in whose name land is taxed.

Slyfield v. Barnum, 71 Iowa, 245; *Wilson v. Russell*, 73 Iowa, 395. The same rule applies where the deed is invalid by reason of the failure to notify the person in possession. The authority of the treasurer to issue the deed is dependent on the service of the notice. The deed is not void. *Bowers v. Hallock*, 71 Iowa, 218. But, as the sale remains incomplete, the period of limitation fixed by the statute will not begin until the sale is perfected.

IV. The point is made by plaintiff that this lot was used exclusively for railroad purposes and assessed by the executive council of the state. Code 1873, section 1317. It is admitted to have been so returned by the company, but there is no evidence of an
6 assessment. The appellee insists that this will be presumed. Section 1319 enumerates the property to be so assessed, and it is said that, as officers are presumed to do their duty, this lot must be held to have been included in the assessment of that body. The objection to such a conclusion is that it ignores the statutory presumption that the tax deed was based on a valid assessment. Code 1873, section 897. The executive council is not concluded by the return of the railroad companies, and may reject property as not coming within the provisions of Code 1873, sections 1317, 1319. To defeat the payment of taxes levied on assessments made by the local authorities, not the return, but another valid assessment, must be shown. This was not done.

V. The plaintiff tendered the amount paid by Ballinger at the tax sale, with interest and penalties, and these it will be required to pay in
7 order to redeem. With this modification the decree will be affirmed. — MODIFIED AND
AFFIRMED.

L. V. HAMBY v. C. C. SAMSON, Sheriff, Appellant.

Larceny: DOG. A dog is the subject of larceny, being comprehended in the term "chattels," as used in Code, 1873, section 8903, defining such crime.

Appeal from the judgment and order of HON. W. B. QUARTON, Judge, Kossuth County.

FRIDAY, APRIL 8, 1898.

THIS is a *habeas corpus* proceeding, in which plaintiff alleged that he was unlawfully restrained of his liberty by the defendant, who is sheriff of Kossuth county, under a warrant of commitment issued by a justice of the peace of said county on an information charging the plaintiff with the crime of larceny of a dog. The district judge discharged the petitioner, and defendant appeals.—*Reversed.*

Raymond & Raymond for appellant.

Clarke & Cohenour for appellee.

DEEMER, C. J.—The sole question presented by this appeal is whether or not a dog is the subject of larceny. That it was not at common law is conceded. The reasons for this were twofold: *First*, because it had no intrinsic value; and, *second*, because it was not fully domesticated,—but by nature base. The courts held that dogs, although reclaimed, could not be used for food, but were kept for the mere whim or pleasure of their owners, and therefore had no intrinsic value. A great deal of research and eloquence has been wasted in attempting to show the fallacy of this rule. It appears to be well

settled, however, that, in the absence of statutory modification of the common law, dogs are not the subject of larceny. *State v. Lymus*, 26 Ohio St. 400; *State v. Doe*, 79 Ind. 9. When the statute relating to larceny covers "personal property in general," or "anything of value," some courts hold that a dog is included, and becomes the subject of larceny. *Mullaly v. People*, 86 N. Y. 365; *Harrington v. Miles*, 11 Kan. 480; *Hurley v. State*, 30 Tex. App. 333 (17 S. W. Rep. 455); *State v. Yates*, 10 Cr. Law Mag. 439. But the cases are by no means harmonious upon this proposition. See *Ward v. State*, 48 Ala. 161. In some states it is suggested that in subjecting dogs to taxation they are thereby made the subject of larceny under the generic terms "personal property" or "chattels" found in the statutes. *Com. v. Hazelwood*, 84 Ky. 681 (2 S. W. Rep. 489); *Mullaly v. People*, *supra*. It is also said by other quite as respectable courts that these taxes are not imposed on the theory that dogs are property, but as police regulations, and therefore such taxation does not bring them within the statute. *State v. Doe* and *State v. Lymus*, *supra*. See also *Sentell v. Railroad Co.*, 166 U. S. 698 (17 Sup. Ct. Rep. 693). Our statute (Code 1873, section 3902) makes it a crime for any one to steal any money, goods, or chattels of another; and, if dogs are intended to be included, it must be under the terms "goods and chattels." That they are not goods is clear. "Chattels," however, is a broader and more comprehensive term, and includes all kinds of property except the freehold and things which are a parcel of it. The supreme court of Kentucky, in the case of *Com. v. Hazelwood*, *supra*, held that a dog was a "chattel," basing its holding upon the thought that the laws of that state recognized dogs as property, for the reason that they imposed a tax upon them, made the owner liable for damages done, and recognized the animal as property in all civil proceedings. But the supreme court

of Pennsylvania, in the case of *Findlay v. Bear*, 8 Serg. & R. 571, held to exactly the contrary doctrine. See, also, *Reg. v. Robinson*, 28 Law J. Mag. Cases, 58. Those courts which hold that a dog is not "personal property," a "thing of value," or a "chattel" bottom their conclusion upon the assumption that it is not property in the strict sense of that term, and that dogs as a class have no intrinsic value. In the case of *Warren v. State*, 1 G. Greene, 106, we held that a raccoon was *faræ naturæ*, and of so base a nature, in contemplation of law, as that one who stole it was not guilty of a larceny; citing *Norton v. Ladd* 5 N. H. 204. But in the subsequent case of *Anson v. Dwight*, 18 Iowa, 241, which was, it is true, a civil case, we said, "Dogs may be personal property, and have value." Neither of these cases decides the question now before us, although it must be conceded that, if we follow the rule of the *Warren Case* to its logical conclusion, and hold that the terms "goods and chattels," as used in this criminal statute, are to be interpreted according to the strict rules of the common law, we must ultimately decide that dogs are not the subject of larceny. Code 1873, section 45, par. 2, provides that words and phrases should be construed according to the context and the approved usage of the language; paragraph 10, that "the word 'property' includes personal and real property"; and that (paragraph 9) the words "personal property" include, money, goods, chattels, evidences of debt and things in action. In the case of *State v. Phipps*, 95 Iowa, 491, we held that the word "chattel," as used in the criminal statute relating to malicious mischief, covered horses and every other kind of personal property. We are constrained to believe that the definition of the words "goods and chattels," as used in the statute under consideration, should be referred to the common understanding at the time when the statute was enacted, and not to the strict

rules of the common law that have no application to our present ideas with reference to the value and use of domesticated animals. No argument is needed to demonstrate that dogs are of much greater value to man than some animals to which the common law attributed value because of their use for food. Much that is said by Justice Earl in the *Mullaly Case* might be quoted with profit, but the length of this opinion forbids. There are other provisions of the Code of 1873 which recognize property in dogs. Thus we find that an *owner* is liable for all damages done by *his* dog (section 1485); that dogs are assessable both by the county and city authorities (see Acts Twentieth General Assembly, chapter 70, and section 499, Code 1873); and that cities may require dogs to be kept upon the premises of the owners thereof (Seventeenth General Assembly, chapter 25). While these are all in the nature of police regulations, yet they clearly recognize property in dogs; and it seems to us they are comprehended within the term "chattels" as used in the statute defining larceny. Surely, it was not the intent of the legislature to recognize dogs as property for the purposes of taxation, and yet leave them to the mercy of thieves. We reach this conclusion unmindful of the fact that the legislature in adopting the new Code added after the word "chattels" as it appears in the Code of 1873 these words: "Including all domesticated or restrained animals." In our opinion, the statute covered "dogs" before its amendment, and the added words have reference to other animals not covered by the generic term "chattels." We are of opinion that a dog is the subject of larceny, and that the trial court erroneously discharged the appellee.—**REVERSED.**

MARGERY BARNHART, Appellant, v. GEORGE S. HANFORD.

Lease: TERMINATION: *By mortgage.* A mortgage of a piano to the
2 lessee thereof, given during the year for which rent had been paid,
and in addition to the usual provisions for taking possession and
selling in case of default, reciting "said piano being now in pos-
session of the said H., in U. hotel,—and is to remain in possession
of the said H. during the force and continuance of the mortgage,"
gives H., the mortgagee, the right to possess and use the piano,
and supersedes the lease.

Contract: CONSTRUCTION. An agreement to pay a specified rent
1 yearly for a piano, besides "*keeping* it in tune" does not render the
lessee liable for the expense of cleaning and tuning it when it is
first received by him. It is an agreement to keep in tune and not
to put in tune.

Appeal from Floyd District Court.—HON. P. W. BURE,
Judge.

FRIDAY, APRIL 8, 1898.

ACTION to recover a balance alleged to be due as
rent on a piano. Defendant answered, claiming that he
held the piano under a chattel mortgage during the
time for which rent is claimed. The issues and facts
appear in the opinion. Judgment was rendered dis-
missing plaintiff's petition, and she appeals.—*Affirmed.*

J. S. Barnhart for appellant.

Reiniger, Lloyd & Prouty for appellee.

GIVEN, J.—I. Under date of December 6, 1884,
defendant wrote to the plaintiff as follows: "Dear
Madam: I notice your piano is still in the rooms occu-
pied by Mr. Shaw. If you will rent it, I will give you
\$24.00 a year from Jan. 1, 1885, besides keeping it in

tune. If I have it, I shall put it in my hotel parlor, where it will be in better condition than where it now is." Plaintiff accepted this offer, and the defendant removed the piano to his hotel parlor, and had it cleaned and tuned, at an expense of five dollars, which he paid, and about January 13, 1885, paid the plaintiff nineteen dollars, on account of the first year's rent. Plaintiff contends that there are five dollars due on the first

year's rent; but not so, we think. Defendant's
1 agreement was not to put, but to keep, the piano in tune, and this implies that the plaintiff was to put it in order; and it is evident that the parties understood that the first year's rent was fully paid. On November 27, 1885, plaintiff executed to the defendant a chattel mortgage on the piano, to secure the payment of her one promissory note of that date to the defendant for sixty dollars, payable February 27, 1886, with ten per cent. interest. Said mortgage, in addition to the usual provisions as to taking possession of and selling the mortgaged property, by the mortgagee, contains

the following: "Said piano being now in the
2 possession of the said Geo. S. Hanford in the Union Hotel, in Charles City, and is to remain in the possession of the said Hanford during the force and continuance of this mortgage." On February 28, 1894, the plaintiff commenced this action to recover rent for the piano under said contract from January 1, 1885, to that date, crediting the defendant with said nineteen dollars, and with the amount of said notes, principal and interest, to January 1, 1889, seventy-eight dollars and fifty-five cents, and asking judgment for one hundred and twenty-five dollars and forty-five cents, with interest from January 1, 1889. On March 19, 1894, plaintiff amended her petition, alleging that since the commencement of the action, defendant was proceeding to foreclose said mortgage, and asking that the proceeding

to foreclose be transferred to the district court, and that the defendant be restrained from foreclosing pending this action. A restraining order was granted "upon filing bond in the sum of \$100"; but, plaintiff failing to file the bond, no order was issued, and the defendant proceeded with the foreclosure, sold the piano, and afterwards bought it from the purchaser at the foreclosure sale.

II. The first question to be considered is whether the mortgage terminated the lease, and as to this we inquire for the intention of the parties. Appellant cites cases upon the subject of conversion of mortgaged property by mortgagees, and their liability for the retention and use thereof. This is a question of contract, and not of tort, and the cases cited are not applicable. There is no question but that, under the acceptance of his offer, defendant had a right to possession and use of the piano. Appellant contends that, by the mortgage, he was only given the right to possession, and not the right to use. Therefore the mortgage did not supersede the lease as to the use of the piano and the right of plaintiff to rent therefor. The right to use is not expressed in the lease; yet no one would question the right of the defendant, under it, to use the piano. The right to use is not expressed in the mortgage, but we think that, viewed in the light of all the facts, the mortgage, taken alone, did confer upon the defendant the right to use the piano so long as it was held under the mortgage. Under provision of the mortgage, the piano was to remain in defendant's possession, in his hotel, during the continuance of the mortgage. Now, surely, it was not contemplated by the plaintiff in making and taking this mortgage that the piano was to so remain as in storage. The place wherein it was to remain indicates very clearly an intention that it was to be used,—an intention that is emphasized

somewhat by the fact that such instruments are better preserved by proper use than by standing unused. We think it quite clear that, taking the mortgage alone, it gave to the defendant the right to possess and use the piano during the continuance of the mortgage, and therefore superseded the prior contract between the parties. It follows from this conclusion that the judgment of the district court must be AFFIRMED.

J. M. CHRIST *et al.*, Appellants, v. THE CITY OF WEBSTER CITY.

Municipal corporations: SEVERANCE OF TERRITORY: Evidence. The owners of unplatted and exclusively agricultural land within the limits of a city are not as matter of law entitled to have such land severed from the city on the claim that it is not needed for any possible increase of the city's population, that they are prejudiced by being taxed on a higher valuation than similar farm lands outside of the city and do not receive a due proportion of benefit therefrom, and that they are deprived of school advantages which they would enjoy if the land were severed from the city; and such facts do not warrant the setting aside of a verdict for the city.

New trial: AFFIDAVITS: Impeachment of verdict. Affidavits of jurors that they misunderstood the instructions cannot be considered on a motion for a new trial, to impeach their verdict.

Appeal from Hamilton District Court.—HON. B. P. BIRDSALL, Judge.

FRIDAY, APRIL 8, 1898.

THIS is a proceeding, under sections 440 to 446, inclusive, of the Code of 1873, to strike certain territory out of the limits of the defendant city. The case was tried to a jury, and a verdict returned as follows: "We, the jury, find for the defendant, that the territory described in the plaintiffs' petition and plat thereto

105	119
129	53

105	119
132	535

105	119
135	563

105	119
137	371

105	119
e138	629
138	652

attached should not be severed from said city." Plaintiff's motion for a new trial was overruled, and judgment entered for the defendant for costs. Plaintiffs appeal.—*Affirmed.*

Hyatt & Hyatt and *D. C. Chase* for appellants.

C. A. Weaver and *A. N. Boetye* for appellee.

GIVEN, J.—I. Said section 440 provides that, when the inhabitants of a part of any town or city shall desire to have the part of the territory of such city or town in which they reside severed from the city or town, "they may apply by petition in writing, signed by a majority of the resident property holders of that part of the territory." Said section 443 provides that, if the court or jury shall be satisfied that the petition has been signed by a majority of the property holders residing within the limits of the part sought to be detached, they shall proceed to inquire as to the other matters required to be established. In this case it was denied that the petition was so signed, and, in submitting that issue, the court instructed, in effect, as follows: That the jury should first determine whether the petition had been signed by a majority of the property holders residing within the limits sought to be detached, and that, in doing so, they should only count the names of the persons signed to said petition who were, at the date of the signing and filing thereof, the actual owners of the land, and actually residing within the territory sought to be severed.

1 Appellants, in support of their motion for a new trial, filed the affidavit of nine of the jurors, in which they say "that the jury, in consideration of said cause, understood from the instructions given by the court that, before they could consider the rights of the plaintiffs to be detached from the defendant city, they should first find that a majority of the petitioners reside

upon the land sought to be detached; that they failed to so find, and for that reason, and that reason alone, returned a verdict for the defendant; that the jury never considered the question of the right of the plaintiffs to be detached from the city." There was not the slightest reason for misapprehending the instructions. They are plain and in exact harmony with the statute. It is sufficient to say, however, as to the claimed misapprehension of the instructions, that this court has uniformly held that such affidavits cannot be considered to impeach a verdict. See *Davenport v. Cummings*, 15 Iowa, 219; *Jack v. Naber*, 15 Iowa, 250; *Wright v. Telegraph Co.*, 20 Iowa, 195; *Turney v. Barr*, 75 Iowa, 750.

II. Appellants insist that the verdict is contrary to the evidence, and that for this reason the court erred in overruling their motion for a new trial. Appellants'

lands have not been platted, and are used exclusively for agricultural purposes. They insist that the evidence shows that their lands are not needed for any possible increase of the city's population, and that they are prejudiced by being taxed upon a higher valuation than like farm lands outside of the city, are subject to a higher road tax than outside lands, and do not receive a due proportion of benefit therefrom; also, that they are deprived of school advantages which they would enjoy if severed from the city. This is not a question of annexing, but of detaching, territory. To retain these lands within the city limits does not render them less valuable nor less available for agricultural purposes. As to the needs of the city, we cannot say, in the face of this evidence and verdict, that probable development may not make it to the interests of the city that this territory be retained. We agree with counsel that it is not the purpose of the law to permit municipalities to extend their limits merely for the purpose of enlarging their margin for taxation, and for

incurring indebtedness; but this land is within the city limits, presumably because the requirements and interests of the city demand it. We cannot presume that appellants will be taxed upon other than a fair valuation, nor that, if so taxed, the equalization boards will not offer them proper relief. Their remedy against unequal taxation is with the board of equalization, and not by this proceeding. The same is true as to the application of the road tax. If it is improperly used or applied, the remedy is not by being detached from the city. While appellants may pay more road tax than is paid on farm lands outside of the city, it is shown they have corresponding benefits, in better roads, and in a full share in the application of the road tax of the city. The school district is not necessarily co-extensive with the limits of the city. It appears that no demand has ever been made by any of the appellants for different school facilities than those now enjoyed. Without further discussing the subject, we will say that, in our opinion, the appellants have failed to show such a state of facts as would warrant us in setting aside the verdict. Our conclusion is that the judgment of the district court should be AFFIRMED.

W. E. JOHNSON v. W. E. NICHOLS, Appellant.

Mortgage. A statement in a deed of land that is sold "subject to one

- 1 existing mortgage of \$300 00," is merely descriptive and is not intended to fix the exact amount due thereon.

COVENANTS. A covenant in a deed to land that it is "free from

- 2 incumbrances," is limited by a statement in the granting clause of the deed, that it is "subject to" an existing mortgage of a specified amount.

Appeal from Hardin District Court.—HON. BENJAMIN
P. BIRDSALL, Judge.

FRIDAY, APRIL 8, 1898.

ACTION at law upon the covenants of a deed. Defendant denied any breach of the covenants save as to one item, which he averred a readiness to pay. Trial to a jury. Verdict and judgment for plaintiff, and defendant appeals.—*Reversed*.

E. R. Seaton and Huff & Ward for appellant.

Kinkead, Mentzer & Granger for appellee.

DEEMER, C. J.—The case comes to us upon this certificate from the trial judge: "The plaintiff brings this suit in this action on the covenants of warranty of a deed, which reads in words and figures as follows, to wit: 'Know all men by these presents: That W. E. Nichols and Sadie E. Nichols, his wife, of Winnebago county and state of Iowa, in consideration of the sum of four thousand and two hundred dollars, in hand paid by W. E. Johnson, of Hardin county and state of Iowa, do hereby sell and convey unto the said W. E. Johnson, and to his heirs and assigns, the following described premises, situated in the county of Winnebago and state of Iowa, to wit: The south half of the southeast quarter, and the southeast quarter of the southwest quarter, of section one, ninety-seven, twenty-five, Hancock county, Iowa. (S. $\frac{1}{2}$) (S. E. $\frac{1}{4}$) and the (S. E. $\frac{1}{4}$) of the (S. W. $\frac{1}{4}$), section (1), township number (97), range (25) west of the 5th P. M., Hancock county, Iowa, subject to one existing mortgage of (\$800) eight hundred dollars. And we do hereby covenant with the said W. E. Johnson that we are lawfully seised in fee simple of said premises; that they are free from incumbrance; that we have good right and lawful authority to sell the same; and we do hereby covenant to warrant and defend the said premises and appurtenances thereto belonging against the lawful claims of all persons whomsoever. And the said Sadie E. Nichols hereby relinquishes all her right of

dower and homestead in and to the above-described premises. Signed the 13th day of March, A. D. 1896. W. E. Nichols. Sadie E. Nichols.' One of the items of plaintiff's claim under the covenants of warranty of the deed is forty-five dollars and twenty-two cents, accrued interest at the time of the delivery of the deed to plaintiff, on the eight hundred dollar mortgage, referred to in the deed in the following language, namely: 'Subject to

one existing mortgage of (\$800) eight hundred
1 dollars.' The question, then, is, as a matter of law: Is the language 'subject to a mortgage of \$800' simply descriptive of the mortgage, carrying with it the accrued and unpaid interest of forty-five dollars and twenty-two cents, and excepted from the covenants of warranty of the deed, and thus not an incumbrance, or would the language in the deed alluded to imply that the item of accrued interest of forty-five dollars and twenty-two cents was contemplated by the terms of the covenants of warranty of the deed, and entitled the plaintiff to recover the same as an incumbrance upon the land, inasmuch as it swelled the mortgage to the sum of eight hundred and forty-five dollars and twenty-two cents, instead of making the same eight hundred dollars, at the time of the delivery of the deed?" The question is thus tersely stated to be whether the words referring to the mortgage are simply descriptive, or are a limitation upon the amount of the incumbrance. Appellee's argument in support of the ruling of the trial court enters into a much broader field than is covered by the question certified. He insists that nothing is excepted from the covenants of warranty against incumbrances, and that he is entitled to recover, not only the interest upon the mortgage, but the principal as well. If this be true, then the only error in the case is the plaintiff's failure to ask judgment for the full amount of the mortgage indebtedness, both principal

and interest. But we cannot agree with him in his contention. The land was sold subject to the mortgage. These words are a part of the description of the estate, and the warranty has reference to that estate thus qualified. *Brown v. Bank*, 148 Mass. 300 (19 N. E. Rep. 382); *Wood v. Boyd*, 145 Mass. 176 (13 N. E. Rep. 476); Jones, Real Property, section 855, and cases cited. The case of *Estabrook v. Smith*, 6 Gray, 570, is not in conflict with this rule, for the reasons pointed out in *Brown v. Bank*, *supra*. *Bennett v. Keehn*, 67 Wis. 154 (30 N. W. Rep. 112), simply follows the case in 6 Gray, and has no reference to such a state of facts as is here disclosed.

With this point determined, we now have the exact question presented by the certificate: Are the words "subject to one existing mortgage of \$800" merely descriptive, or are they words of limitation? The mortgage was but a single incumbrance. It stood as security for the payment, not only of the principal debt, but of the interest as well. It was that security which was exempted from the covenants of the deed, and not an incumbrance to any certain amount. The words were merely descriptive of the mortgage, and were clearly not intended to fix the exact amount due thereon. This exact question has been decided by the supreme court of Massachusetts in the case of *Shanahan v. Perry*, 130 Mass. 460. The court there held that the words were descriptive, and that the accrued interest upon the debt secured was excepted from the general covenants. The trial court should have instructed the jury that plaintiff was not entitled to recover the interest paid by him.—REVERSED.

N. HAMLIN, Appellant, v. B. F. SIMPSON.

105	125
107	644

Checks: PRESENTATION. In the ordinary course of business a check received by the payee, sixteen and three-fourths miles from the bank upon which it was drawn, should be presented for payment, at the latest, the second day after its receipt.

OVERDRAFTS. Although the drawer of a check has not sufficient funds
1 on deposit to meet it, if he has grounds for belief that it will be
3 honored, it is the payee's duty to present it for payment; and a
failure to do so will release the drawer if he is damaged thereby.

SAME. The drawer of a check had on deposit with a bank drawn on,
1 two thousand dollars, for which he held a certificate of deposit,
3 but had no general funds to his credit. He claims that he had an
arrangement whereby he was permitted to check against such
certificate, and in fact had been allowed to overdraw his general
account. *Held*, that he had reasonable ground to believe that the
check would be paid.

KNOWLEDGE OF INSOLVENCY. Where a check was drawn upon a
5 bank which was insolvent, the fact that three days later the drawer
deposited more than enough to meet the payment of the check is
decisive evidence that he had no knowledge of the insolvency
when he drew the check.

BURDEN OF PROOF. The burden of proof is upon the payee of a check
4 to show that the drawer was not injured by the former's failure to
present the check for payment within a reasonable time.

STATUTE OF FRAUDS. An agreement, between the holder of a certifi-
2 cate of deposit and the cashier of a bank, that such holder could
check against the amount of the certificate, cannot be objected to
by the payee of a check so drawn, if by any one, on the ground
that such agreement is within the statute of frauds.

Appeal from Audubon District Court.—HON. N. W. MACY,
Judge.

FRIDAY, APRIL 8, 1898.

PLAINTIFF seeks to recover the sum of nine hundred and twenty-nine dollars and forty-six cents for hogs and cattle sold the defendant. The answer admits the purchase of said live stock at the price named, but avers that the price was settled for at the time by bank checks, which plaintiff held an unreasonable time before presenting for payment, and that the bank upon which they were drawn became insolvent. By way of reply, plaintiff says that, at the time defendant drew said checks and delivered them to plaintiff, he (defendant) had no funds with which to meet them in the bank upon

which they were drawn; that at said time said bank was hopelessly insolvent, and that this fact was well known to defendant, and unknown to plaintiff; and that a presentment of said checks would have been useless. The case was tried to the court without a jury. There was a judgment dismissing plaintiff's petition, and in favor of defendant for costs. Plaintiff appeals.—*Affirmed.*

Willard & Willard for appellant.

Theo. F. Myers and *F. E. Brainard* for appellee.

WATERMAN, J.—The facts, as stipulated or established, are that on December 13, 1893, the defendant gave his two checks on the Cass County Bank of Atlantic to plaintiff in settlement for live stock purchased. One of the checks was for four hundred and forty-one dollars and eighty cents; the other, for four hundred and eighty-seven dollars and sixty-six cents. The checks were given by defendant, at plaintiff's home in Audubon county, sixteen and three-fourths miles from Atlantic, and five and one-half miles from Brayton, a station on a railroad leading to Atlantic, upon which two trains a day, except Sunday, ran to the last-named town. There was a bank in Exira, a town seven miles from plaintiff's home. Plaintiff never presented the checks for payment, and on December 27, 1893, the Cass County Bank, being insolvent, was placed in the hands of a receiver.

II. As an excuse for not presenting the checks for payment, and to show that defendant suffered no injury by the failure so to do, the plaintiff alleges that defendant at the time he gave the checks had no
1 funds in said bank against which to draw. In the ordinary course of business, the checks should have been presented for payment, at the latest, during

business hours of the second day after their receipt, which would have been the fifteenth. Tiedeman, Commercial Paper, section 443. At that time, and for some days before, defendant's general account with the bank was overdrawn. On December 16th he deposited one thousand, one hundred and fifty dollars and seven cents. During all this time defendant had on special deposit in this bank the sum of two thousand dollars, represented by two certificates of deposit for one thousand dollars each. As a general rule, it may be said that a check drawn on a bank in which the drawer has not sufficient funds to meet it need not be presented at all, in order to hold the drawer. This rule, however, has some qualifications. The reasons for it seem to be that it is deemed a fraud for one to give a check which he has no ground to believe will be paid, and that he does not need notice of the fact that the check is not paid, when he must have known that payment would be refused. But if he has reason to think his check will be honored, though he may have no credit balance on the books of the bank, his act in drawing it will not be a fraud; and he will be in a position to insist on prompt presentment, demand and notice. In *Beauregard v. Knowlton*, 156 Mass. 395 (31 N. E. Rep. 389), the rule is said to be that the drawing of a check on a bank wherein the drawer has no funds, and *with no ground for a reasonable expectation that the check will be paid*, is a fraud, and will excuse the failure to present for payment. See, also, *Savings Co. v. Weakley*, 103 Ala. 458 (15 South Rep. 854); *Case v. Morris*, 31 Pa. St. 100; *True v. Thomas*, 16 Me. 36; *Stanton v. Blossom*, 14 Mass. 116; *French v. Bank*, 4 Cranch, 141; *Robinson v. Ames*, 20 Johns. 146; *Bank v. Easley*, 44 Mo. 286; *Hill v. Norris*, 2 Stew. & P. 114. In speaking of the rule that excuses demand and notice when the drawer has no funds in the hands of the drawee, it is

said in *Case v. Morris, supra*: "It introduced an exception to a plain and intelligible rule of commercial law, which many eminent and experienced judges have since regretted. It is adhered to on the principle of *stare decisis*, but it is not to be extended a single step."

III. Under the rule stated, we have this situation: There being no funds to the credit of defendant's general account in the Cass County Bank, plaintiff was presumptively under no obligation to make demand for the money; but this presumption is rebuttable, and defendant seeks to overcome it by this showing: During all this time he held certificates of deposit, issued by the bank, for the sum of two thousand dollars, and he claims to have had an arrangement with the cashier by which he was allowed to check against this amount.

IV. Appellant's first objection to this defense is that any such agreement with the cashier would be within the statute of frauds, and that oral evidence cannot be received to establish it. Whatever
2 merit there might be in this claim, if this were an action on the agreement, it is certainly not good under the circumstances of this case. No more is being claimed here for the cashier's promise than that it gave defendant reasonable ground to believe his checks would be paid.

V. Next it is said that no such agreement is established. The defendant is the only witness to testify on this point; and while in several of his answers he gives conclusions instead of specific facts, yet he does in one answer state clearly and positively that the cashier told him that he might check against this special deposit. The circumstances tend, we think, to corroborate him. This bank for some time prior to December 27, 1893, was hopelessly insolvent. During the period of the transactions between these parties it was making desperate efforts, from day to day, to keep open its doors.

It needed every dollar it could obtain to enable it to continue its business, and yet during this time defendant was allowed to overdraw his general account. This circumstance seems almost conclusive. Upon no other theory than an agreement such as defendant claims would this state of affairs have been permitted.

3 We think defendant has established that he had reasonable ground to believe the checks given plaintiff would be paid on presentation. This being true, the failure to make timely demand and give proper notice will release defendant, if he has been damaged by such default.

VI. The burden of proof is on plaintiff to show that defendant was not injured. *Kirkpatrick v. Puryear*, 93 Tenn. 409 (24 S. W. Rep. 1130). When the bank

went into the receiver's hands, defendant had on 4 deposit two thousand dollars on certificates, and six hundred and forty dollars and fifty-three cents on general account. This was the amount of his loss. But he holds some collateral security, which was given him by the bank prior to the failure. If the checks had been presented and paid, defendant's balance would have been one thousand, seven hundred and eleven dollars and seven cents, and the undisputed testimony is that the collateral is insufficient to pay this amount. It affirmatively appears, then, that defendant has been damaged by plaintiff's default.

VII. It is also urged by plaintiff that defendant knew the bank was insolvent at the time he drew these checks. This defendant denies. But the fact that he took security for his deposits is offered as an argument in support of this allegation. We think, perhaps, the financial crisis of 1893 was a matter so affecting the interests of the whole people as that we may take judicial notice of it, and the condition of things resulting from it. About the time of this transaction, banks

were failing in almost every part of the country. Even those that were entirely solvent hoarded their cash, and parted with it only on compulsion. Every bank depositor was nervous, and with good reason. Defendant's act in taking security, which might in ordinary times have meant much, under the circumstances then existing meant but little. It evidenced scarcely anything more than the timidity that was then generally prevalent among depositors. But if, perhaps, we have no right to take cognizance of these matters, of which no evidence was offered, there is one fact in testimony that is, in our minds decisive of this point. Three days after these checks were given, defendant deposited one thousand, one hundred and fifty dollars and seven cents in this bank, and more than six hundred dollars of it remained, as we have already said, and was lost in the final wreck. Such action on defendant's part, it is not reasonable to believe, would have been taken, had he known the bank was insolvent. This covers the case as presented, and our conclusion is apparent. The judgment below will be **AFFIRMED**.

STATE V. W. F. NINE, Appellant.

False pretenses: INDICTMENT. An indictment for obtaining property by false pretenses, which alleged that the note given in payment for the property was represented to be good and of par value, that such representations were false and known to be so, and that the property was received because of them, stated an offense.

IMMATERIAL ALLEGATIONS. In an indictment for obtaining property by false pretenses, an averment that the notes given in payment of the property were "assigned and transferred" does not charge that they were indorsed; and allegations that defendant falsely represented the financial worth of the assignor, and thereby obtained credit, thus assuming the assignor, to be an indorser, are immaterial. As it was not charged that the notes were indorsed, the financial standing of one asserted to have indorsed them cannot be material.

106	181
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106	181
123	142

Submission of. Where an indictment charged several false representations, any one of which, if material, might have been the
4 basis of a conviction, it was erroneous to submit to the jury such representations as were immaterial.

Appeal: OBJECTION BELOW: *Criminal law.* Where a trial was had
5 on an indictment alleging facts which were immaterial, and the jury was instructed to consider such facts, the case will be reviewed, although no objection to the testimony was made in the court below.

Appeal from Polk District Court.—HON. W. F. CONRAD,
Judge.

FRIDAY, APRIL 8, 1898.

INDICTMENT for obtaining property by false pretenses. Verdict of guilty, and a judgment thereon, from which the defendant appealed.—*Reversed.*

Dale, Kinkead & Bissell for appellant.

Milton Remley, attorney general, and *Jesse A. Miller* for the state.

GRANGER, J.—The indictment is against defendant, Nine, and one John Stewart, but the trial was alone as to Nine. The property charged to have been obtained by false pretenses was boots, shoes, and other property, of the value of eight hundred dollars, belonging to one Joseph Lawson. For such property Lawson received two notes, one for five hundred dollars and one for three hundred dollars, payable to the order of John Stewart, and signed by Walter Brinkerhoff, which notes were to be secured by a mortgage on certain described land in the state of Missouri. These facts appear in the indictment, and the following is a statement of the false pretenses employed: “Which said notes W. F. Nine
1 and John Stewart represented and agreed the said John Stewart, in the event they traded or sold said notes to the said Joseph Lawson, would

indorse; and that he, the said John Stewart, would assign and transfer said notes and each of the said notes to the said Joseph Lawson; and the said W. F. Nine and John Stewart did then and there state, declare, and represent to the said Joseph Lawson that said notes were valuable and good, and the reasonable aggregate market value of said notes was eight hundred dollars of lawful money of the United States; that the said John Stewart was then and there the lawful owner and possessor of said notes; that the said John Stewart was then and there the owner and possessor of much other valuable property, personal and real; that the said John Stewart was then and there the owner of two farms, one of one hundred and twenty acres of valuable land, and the other one hundred and sixty acres of valuable land, both located in Guthrie county, Iowa, and of a certain house and lot in the vicinity of Twentieth and Clark streets, in the city of Des Moines, Iowa, of the reasonable market value of six thousand dollars, a more particular description and designation of said real estate being to this grand jury at this time unknown." These averments are followed by statements of the belief and good faith of Lawson; that he relied on the representations, and delivered the boots, shoes, and other property to Nine and Stewart. It is then averred that the representations were false, and known to be so.

It is thought that the indictment is fatally defective because it fails to allege that the notes were indorsed by Stewart. If the fact of Stewart's indorsement is not to be understood from the averments of the indictment, it is not thought by counsel for the state that the representations as to the property owned by Stewart are material; at least, there is no such contention, and there seems no room to doubt such a conclusion. The
2 endorsement was essential to a personal obligation of Stewart on the note, and, if the note was taken without such liability, it could not well be said

that such representations defrauded Lawson, for his position would be the same whether the representations were true or false. But it is said by appellee that the indictment is good, even though the representations as to Stewart's property be disregarded, and in this we think appellee is right. One of the false representations charged is that the notes were good, and of the aggregate value of \$800. If such representations were false, and known to be so, and property was obtained because of them, which, for this purpose, we assume, because it is so charged, then the indictment states an offense.

It is thought, however, by appellee, that the indictment does, in legal effect, charge that the notes were indorsed. It will be seen that it charges that Nine and Stewart agreed, in the event of the trade, that the said John Stewart "would indorse, and that he, the said John Stewart, would assign and transfer, said notes, and each of said notes, to the said Joseph Lawson." That is simply the averment as to the agreement in the event of a trade. In averring what was done it merely appears that the notes were "assigned and transferred by the said John Stewart to the said Joseph Lawson."

3 It is not in terms said that they were indorsed, but appellee insists that the words "assigned and transferred" are legally equivalent to an averment that they were indorsed. To sustain such a claim, we must, in effect, hold that the only legal method of assigning and transferring such a note is by endorsement, so that the terms will be equivalent in meaning. If the notes could be assigned and transferred by other methods, then such an averment might and might not mean a transfer by indorsement. The term "assigned and transferred," without modifying or restrictive language, would include any legal method of so doing. In *Ruby v. Culbertson*, 35 Iowa, 264, we held that the possession

of such a note was *prima facie* evidence of plaintiff's ownership, and that it need not be proven by written assignment. In *Pearson v. Cummings*, 28 Iowa, 344, treating of such a note, it is said: "Although the note had not been indorsed to the plaintiff, yet, if she was the real owner thereof, she might bring suit in her own name, being the real party in interest." In *Franklin v. Twogood*, 18 Iowa, 515, after speaking of different methods of assignment, in regard to such a note, it is said: "If there be an assignment thereof, without indorsement, the holder will thereby acquire the same right only as he would acquire upon an assignment of a note not negotiable." See, also, *Younker v. Martin*, 18 Iowa, 143. It seems to us quite conclusive that the language of the indictment should not be construed as charging that the notes were indorsed by Stewart. These conclusions render the averments of the indictment as to false representations in regard to the property of Stewart mere surplusage.

II. The court by its instructions permitted the jury to consider three representations charged as false: *First*, that as to the ownership of the farms in Guthrie county; *second*, that as to the ownership of the house and lot in the vicinity of Twentieth and Clark streets, and, *third*, that in regard to the notes being good and valuable. These were distinct representations and either might have been, if sustained by the proofs, the basis of a verdict for the state. With our conclusion as
4 to the first two representations, it follows that they should have been disregarded, and the instruction permitting their consideration is erroneous. It is said that the case was tried on the theory that the indictment did charge that the notes were indorsed, and the evidence to show that fact was admitted without objection. The claim, as to the admission of evidence, seems to be true, and, were it not that the instructions

permitted the jury to consider issues of fact not presented by the indictment and plea, a different question might be before us; that is, had this immaterial testimony been so admitted as to be limited, in its effect, to the issue joined, without objection, a different ruling might follow. As to that we do not determine. With

an instruction presenting a question of fact not
 5 involved we have a different question. The rule that objections not raised in the court below will not be considered in this court does not apply in criminal cases, *State v. Potter*, 28 Iowa, 554; *State v. Daniels*, 90 Iowa, 491. See, also, *State v. Lundermilk*, 50 Iowa, 695, and *State v. Barlow*, 50 Iowa, 701. It seems to us clear, that to permit the jury to convict on an issue of fact not involved, as is the case with instruction No. 4 of those given by the court, is prejudicial error, for which the judgment must be REVERSED.

THE UNION BANK OF WILTON V. THE CREAMERY PACKAGE MANUFACTURING COMPANY, Appellant.

Conditional sales: RECORDING: Priorities. One claiming title to property because the terms of a conditional sale by him, which was
 1 not recorded, were not complied with, is not entitled to property so transferred as against a mortgagee who, without notice of the sale, acquired an interest in the property from the purchaser after the conditional sale, though the chattel mortgage is not properly acknowledged.

MORTGAGES. One who extends the time of payment of an antecedent
 2 debt, in consideration of a chattel mortgage given to him, is within the protection of Code, 1873, section 1922, providing that a conditional sale of a chattel, the title being reserved in the vendor, is not valid as against any creditor or purchaser without notice unless the agreement of sale is acknowledged and recorded.

Appeal: CONFLICTING EVIDENCE. When the evidence, though con-
 8 flicting, is ample to sustain the findings and judgment of the trial court, they will not be reversed.

Appeal from Muscatine District Court.—HON. WILLIAM F. BRANNAN, Judge.

FRIDAY, APRIL 8, 1898.

ACTION at law to recover the possession of specific personal property. There was a trial by the court without a jury, and a judgment for the plaintiff. The defendant appeals.—*Affirmed.*

Richman & Burk and *Richman & Richman* for appellant.

P. M. Detwiler for appellee.

ROBINSON, J.—In January, 1894, one S. G. Kelly procured of defendant a milk separator under an agreement which provided that it should be held by Kelly as “collateral security in trust and for the benefit of and subject to the order of the Creamery Package Manufacturing Company” until he had paid in full all his obligations to the company. The agreement was not acknowledged or recorded. In June, 1894, Kelley gave to the plaintiff a mortgage upon the separator and other property, to secure the payment of a debt of two thousand five hundred dollars. The mortgage was dated the twentieth and acknowledged on the twenty-eighth day of the month. On the third day of the next month the plaintiff took possession of the separator, and it was afterwards taken by the defendant. This action was brought to recover the separator from the defendant, and the right of possession is claimed by the plaintiff under the chattel mortgage. The defendant claims the property by virtue of its former ownership and its agreement with Kelly, and alleges that there is a balance due to it from Kelly of eight hundred and nine dollars and sixty-three cents. It

alleges further that when the mortgage was given Kelly advised the plaintiff fully of the defendant's interest in the property; that it was not his, and should not be included in the mortgage; that he did not intend to include it in the mortgage, and did not know, when that was executed, that it included the separator; and that the mortgage is fraudulent. The district court found specially that when the mortgage was delivered to the plaintiff it did not have any notice of the agreement under which the defendant claims; that the mortgage was given to secure an amount then due the plaintiff, and that it is entitled to the immediate possession of the separator. Judgment was rendered according to the findings. This cause was before us on a former submission, and an opinion was filed, but a re-hearing was ordered, and the cause is again submitted for our consideration. The agreement and mortgage in controversy were involved in the case of *Creamery Package Mfg. Co. v. Union Bank of Wilton*, 100 Iowa, 370.

I. The acknowledgment of the mortgage was taken by the cashier of the plaintiff, and it is claimed that the acknowledgment was invalid for that reason, and that the record of the mortgage did not impart constructive notice of the rights of the plaintiff. Whether the cashier had such an interest in the mortgage as to be disqualified to take the acknowledgment we need not determine. The acknowledgment was not essential to the validity of the mortgage, but it was as effectual as between the parties to it, and as against all persons having notice of it, as though it had been duly acknowledged. The defendant's interest in the mortgaged property has not been acquired since the mortgage was given, but depends upon the agreement with Kelly. That was a conditional sale of the separator, the possession of which passed to Kelly, and the

reservation of the title and interest for which the agreement provided was not valid as against any creditor or purchaser of Kelly without notice. Code 1873, section 1922. Therefore, if the mortgage was not duly acknowledged, that fact is immaterial to any right the defendant can maintain as against the plaintiff. The appellant insists that a valid and sufficient record of the mortgage or other notice thereof was necessary to protect the interest transferred by the mortgage as against the defendant; but that claim is not sound, for the reason that, as already stated, the defendant has not acquired any interest in the separator since the mortgage was given.

II. The plaintiff's right of recovery depends upon the strength of its own title, and it is insisted that the mortgage was given to secure an antecedent debt, and for that reason cannot prevail against the title of the defendant. The case of *Myer v. Car Co.*, 2 102 U. S. 1, is referred to in support of that claim, but that case involved the effect of a mortgage upon property acquired after it was executed, and not the effect of a mortgage given to secure an antecedent debt, and is not applicable to the question now before us. The plaintiff, when the mortgage was given, granted to Kelly an extension of time on the debt secured, and the plaintiff thus became entitled to the protection afforded by Code 1873, section 1922.

III. There was a conflict in the evidence respecting the intent of Kelly to mortgage the separator and the knowledge which the plaintiff then had of the interest in it which the defendant claims, but the evidence which tended to show that Kelly knew when he executed the mortgage that it included the separator, and that he did not speak of the defendant's interest, and that the plaintiff did not have any knowledge of it until

after the mortgage was given, and that the mortgage was not fraudulent, was ample to sustain the findings and judgment of the district court. The reformation of the mortgage is not asked, and, had it been, the evidence would not have justified it. We conclude that no reason for disturbing the judgment of the district court is shown, and it is **AFFIRMED**.

SPENCER H. SMITH V. RICHARD T. WELLSLAGER, F. M. LUPTON & COMPANY *et al.*, Appellants.

Appeal: **REPORTER'S TRANSCRIPT:** *Written evidence.* The notes of the court stenographer are not written, within the meaning of the law. But when his notes, identifying all documentary evidence, are duly certified to by the trial judge, the transcript thereof, including the judges certificate, duly certified by the reporter, may become written evidence.

TRIAL DE NOVO. To secure a trial *de novo*, however, a transcript of the evidence must be on file within six months from rendition of final decree.

ASSIGNMENT OF ERRORS: *Review in equity.* Under existing statutes (sections 2741, 2742, Code of 1873, as amended by chapter 83, Acts Eighteenth General Assembly, and chapter 145, Acts Seventeenth General Assembly) equitable action must be tried on such evidence as the law deems to be written evidence, and unless there is written evidence preserved as those statutes direct, issues of fact in an equitable action will not be reviewed on assignment of error though the evidence may have been so taken and preserved as to warrant review were it still permissible to try equitable actions as law actions.

Presumptions. If all the evidence taken in the trial of an equitable action is not before the supreme court, the rulings thereon, even if erroneous, will be presumed to have been without prejudice.

Office of. The only purpose of an assignment of errors in an action heard in equity is to point out the errors of law. Such errors seem to be limited to rulings affecting the pleadings or decree; *e. g.*, if the decree is contrary to a finding of facts or where the pleadings do not warrant the relief granted.*

Rulings on evidence. An assignment of errors is not necessary in an action heard in equity, in the case of erroneous rulings on the admission of evidence, as they can only be determined on trial *de novo*.

Judgment on Pleadings. An assignment of error is not required in an action heard in equity, where judgment is rendered on the pleadings.

Motions and Demurrers. A ruling on a motion or demurrer in an action heard in equity can only be brought to the attention of the supreme court on error assigned.

Appeal from Polk District Court.—HON. W. F. CONRAD, Judge.

FRIDAY, APRIL 8, 1898.

ACTION to foreclose a chattel mortgage on a stock of goods owned by the Lathrop-Rhoads Company, and to establish a lien on certain accounts assigned to secure the debt, and to establish the priorities of lienholders. Richard T. Wellslager was appointed receiver of all the goods, accounts, and choses in action of the company, and, in behalf of the other creditors, answered, alleging that the Lathrop-Rhoads Company, in executing the note to plaintiff, acted *ultra vires*, and the mortgage and assignment of accounts were made by said company for the purpose of hindering, delaying, or defrauding creditors. The F. M. Lupton Publishing Company and the National Wall-Paper Company intervened, making substantially the same claim against plaintiff's right of recovery as set up by the receiver. There was a decree for plaintiff as prayed, and Wellslager, as receiver, appeals.—*Affirmed.*

C. H. Sweeney, Bailey & Ballreich, Granger & Bennett, N. B. Raymond and J. C. Macey for appellant.

Dudley, Coffin & Byers for appellee.

LADD, J.—Issue of fact was joined, and the cause tried at the September, 1896, term of court. At the conclusion of the trial the report in shorthand of all the

proceedings had was duly certified by the judge and official reporter, and filed. Final decree was entered October 24, 1896. A transcript of the evidence was prepared and certified by the reporter December 1, 1896, but not filed with the clerk till October 18, 1897, and then without the certificate of the judge. The appellee moved to strike the evidence and affirm because the evidence had not been made a part of the record, and no question of law involved may be passed upon without such evidence. Thereupon the appellants filed an assignment of errors, and the appellee, by amendment to his former motion, asks that this be stricken from the files for the reason that the cause was tried in the district court as an equitable action, on issues joined, and no rulings were had or exceptions saved as required on law issues, and the assignment of errors is predicated on the evidence, which is not properly before this court.

I. The notes of the stenographer are not writing, within the meaning of the law. *Godfrey v. McKean*, 54 Iowa, 127; *Baldwin v. Ryder*, 85 Iowa, 251. But when his notes, identifying all documentary evidence, are duly certified to by the trial judge, the transcript thereof, including the judge's certificate, duly certified by the reporter, may become written evidence. *Ross v. Loomis*, 64 Iowa, 432; *Goetz v. Stutsman*, 73 Iowa, 693; *Burnett v. Loughbridge*, 87 Iowa, 324; To secure a trial *de novo*, however, a transcript of the evidence must be on file within six months from the time final decree is entered. *Merrill v. Bourc*, 69 Iowa, 653; *Arts v. Culbertson*, 73 Iowa, 13; *Yetzer v. Wiles*, 91 Iowa, 478; *Kavalier v. Machula*, 77 Iowa, 123; *Lumber Co. v. Davis*, 82 Iowa, 731; *Calef v. Cole*, 93 Iowa, 679; *Bank v. Redhead*, 103 Iowa, 421. See also *Dietz v. Pipe Co.*, 103 Iowa, 542.

II. But appellants insist that they are entitled to a hearing on their assignment of errors, and that for this purpose the evidence is properly before this court. The report of all the proceedings, taken down in shorthand, when duly certified by the trial judge and reporter, constitute a complete bill of exceptions in an action at law, if filed at the conclusion of the trial. The time for filing the transcript is not limited by the statute. *Hammond v. Wolf*, 78 Iowa, 227; *Fleming v. Stearns*, 79 Iowa, 256; *Slone v. Berlin*, 88 Iowa, 205; *Barber v. Scott*, 92 Iowa, 52. That a different rule, however, 4 obtains in equity, is recognized in these cases.

Formerly, all issues of fact, whether ordinary or equitable, were tried on oral evidence, except those of actions in equity, where trial on written evidence was ordered by the court on the application of one of the parties, made at the appearance term. Code 1873, sections 2741, 2742. Under these sections of the statute, the rules pertaining to the preparation of the record in ordinary actions applied, unless trial was ordered on written evidence. *Cross v. Railway Co.*, 51 Iowa, 683; *Lutz v. Kelly*, 47 Iowa, 307. Section 2741 was amended by chapter 83 of the Acts of the Eighteenth General Assembly, limiting trials on oral evidence to ordinary actions. Section 2742 was also amended by chapter 145 of the Acts of the Seventeenth General Assembly, and again by chapter 35 of the Acts of the Nineteenth General Assembly, and as so amended is as follows: "But in equitable actions, wherein issue of fact is joined, all the evidence offered in the trial shall be taken down in writing, or the court may order the evidence, or any part thereof, to be taken in the form of depositions, or either party may at pleasure, take his testimony, or any part thereof by deposition. All the evidence so taken shall be certified by the judge at any time within the time allowed for the appeal of said cause, and be made a part

of the record and go on appeal to the supreme court, which shall try the cause anew." Attention is called to the change in these statutes in *Schmeltz v. Schmeltz*, 52 Iowa, 512. The authorities upon which appellant relies construed the sections of the Code of 1873 prior to their amendment. At present the only provision concerning the manner of trying equitable actions, and the preservation of the evidence taken, as a part of the record, which shall go on appeal to the supreme court, is that quoted. The law, as it now stands, requires such actions to be tried on written evidence, and no motion for that purpose is required. *Hines v. Horner*, 86 Iowa, 594. It is only when an equity case is tried as a law action that the rules for making the evidence a part of the record in such an action apply. The issues joined in this case could not be properly heard, save in a court of equity. The hearing was had on that side of the calendar. Objections were interposed to evidence, but no rulings made, or exceptions taken. It was heard in the district court as an equitable action, and the defendants were required, in order to make the transcript, when duly certified, a part of the record for any purpose of appeal, to file it with the clerk within six months from the time final decree was entered. Having failed to do so, the motion to strike must be sustained. *Independent Dist. v. Ross*, 95 Iowa, 69; *Giltrap v. Watters*, 77 Iowa, 149; *Fritzler v. Robinson*, 70 Iowa, 500; *Bryant v. Fink*, 75 Iowa, 516; *Frank v. Hollands*, 81 Iowa, 164; *McCormick v. Lundburg*, 74 Iowa, 558.

III. The only purpose of an assignment of errors in an action heard in equity is to point out the errors of law. It is not necessary in event of erroneous rulings on the admissibility of evidence, for these
5 can only be determined on trial *de novo*; for, if all the evidence is not before the court, the rulings, even if erroneous, may well be deemed to have been

without prejudice, owing to the presumption in favor of the correctness of the court's conclusions. Nor where judgment is on pleadings is an assignment of error required. *Early v. Burt*, 68 Iowa, 716; *Heidlebaugh v. Wagner*, 72 Iowa, 601. See, also, *Jordan v. Wimer*, 45 Iowa, 65. But the ruling on a motion or demurrer can only be brought to the attention of this court on error assigned. *Powers v. O'Brien County*, 54 Iowa, 501; *Patterson v. Jack*, 59 Iowa, 632; *Fink v. Mohn*, 85 Iowa, 739; *Marshall v. Westrope*, 98 Iowa, 324; *Bank v. Pottorfe*, 96 Iowa, 354. The utility of an assign-

6 ment of error in a cause tried in equity seems to be limited to rulings affecting the pleadings or the decree entered. If the decree, for instance, is contrary to the finding of facts therein contained, it would seem it might be corrected on assignment of errors. And, where the relief granted in the decree is not warranted by the pleadings, might not the remedy be obtained on appeal, through an assignment of error, without the complete record? No such errors are complained of, however, in this action, and those assigned can only be determined from an examination of the evidence. For this reason the motion to strike the assignment of error from the record will be sustained. As the appellee could not well anticipate what the rulings of the court might be, and in view of the time the appellant filed the assignment of errors, we think the motion to strike the appellee's amendment to the abstract should be overruled.—AFFIRMED.

A. N. AND N. A. WHITE V. G. W. MARQUARDT & SONS,
Appellant.

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Corporations: **POWERS:** *Stock Liability.* A corporation organized to do business as a dealer and jobber in jewelry without any limitation as to the kind of property which it might take in exchange for
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- 1 its merchandise, cannot escape liability as a stockholder on stock of another corporation received, in exchange for its jewelry, on the ground that it had no power to acquire such stock. where it has had all the benefits of the exchange and has sold the stock received, retaining the proceeds.

TRANSFER OF STOCK: Recording. A purchaser of corporate stock is not relieved from liability as a stockholder for corporate debts.
2 simply because the transfer of the stock was not recorded in the books of the corporation.

Appeal from Polk District Court.—HON. W. F. CONRAD,
Judge.

FRIDAY, APRIL 8, 1898.

ACTION at law to recover of the defendant an amount alleged to be due on capital stock of the Zoological Park Company of Des Moines, Iowa. There was a trial by the court without a jury, and a judgment in favor of the plaintiffs. The defendant appeals.—*Affirmed.*

Bishop, Bowen & Fleming for appellant.

Dowell & Parrish and *Earl & Prouty* for appellees.

ROBINSON, J.—The material facts involved in this case are so nearly like those which were controlling in the case of *White v. Green*, 105 Iowa, *post*, that when a re-hearing was ordered in that case a re-hearing was also granted in this, which had also been previously submitted, and the case is again submitted for our determination. The decision announced in *White v. Green*, so far as applicable, must control in this case, and we need not repeat what was there said. But the appellant also relies upon defenses not involved in that case, which we will now consider.

I. G. W. Marquardt & Sons is a corporation, and alleges that it had no power to acquire or own stock of

any other corporation, and that the stock in question was purchased by a member of the corporation without authority. The evidence shows that the defendant was organized for the purpose of doing the business of a "dealer and jobber in jewelry, including all such kinds and classes of merchandise as are usually handled by the largest wholesale jewelry houses in the United States," and that it transacted the business for which it was organized. It purchased the stock in the ordinary course of business, exchanging it for merchandise in which it was dealing. Its articles of incorporation did not impose any limitation as to the kind of property it

might take in exchange for its merchandise, and
1 the shares of stock it received were property. The contract for the purchase of the stock was made by the treasurer of the defendant, and he was authorized to and did act for the defendant in transacting a large share of its business, and in buying and selling merchandise. The sale of property and the taking in exchange of the stock in question were within the authority given him, and the powers he habitually exercised. Moreover, the transaction was fully ratified by the defendant, and has been completed. The defendant has had all the benefits conferred by the exchange, and has sold the stock which it received, and retains the proceeds of the sale. Under these circumstances it cannot successfully deny that the purchase of the stock was authorized and valid. *Lumber Co. v. Foster*, 49 Iowa, 25; *Matt v. Society*, 70 Iowa, 461; 1 *Morawetz, Private Corporations*, sections 431, 432.

II. The books of the Zoological Park Company do not show that five of the sixteen shares of its stock in controversy were ever owned by the defendant.

2 It appears that the certificate for the five shares was transferred to and in fact owned and held by the defendant, but that the transfer was not

recorded in the books of the company, and when defendants sold the stock the books were made to show a transfer from the person from whom the defendant procured the stock to the one to whom it was sold. But the liability of the defendant for the debts of the company did not depend upon the showing as to a transfer of the stock which was made by the books. The defendant did in fact own the stock, and was liable, as owner on account of it. Code 1873, section 1082; *Spring Co. v. Smith*, 90 Iowa, 331; *Bissell v. Heath*, 98 Mich. 472 (57 N. W. Rep. 585). We do not find any reason for disturbing the judgment of the district court, and it is **AFFIRMED**.

BANK OF STRATTON, Appellant, v. S. DIXON.

Checks: INDORSEMENT: *Rights of Third Parties.* An agent received of his principal's debtor a check for the debt, payable to him as agent. He indorsed the check as agent and gave it to the debtor, 2 saying that he wished a draft instead of the check. The debtor took the check and purchased a draft with it. There was nothing to show that the bank had any knowledge of the debtor's want of authority to put the check in circulation. *Held*, that such facts were not a defense to an action by the bank against the agent as indorser of the check, the defense resting on the ground that the indorsement by the agent amounted to surrendering the check to its maker.

Judgment: VACATION. Defendant in an action on a judgment of another state, against whom judgment by default is rendered is not entitled to have the default set aside on the mere defense of 1 *nul tiel* record, under Code 1873 section 3159, providing that the judgment shall not be vacated until it is adjudicated that there is a "valid defense" to the action. It must be shown that petitioner was not indebted to judgment plaintiff.

Appeal from Jasper District Court.—HON. A. R. DEWEY, Judge.

FRIDAY, APRIL 8, 1898.

THE plaintiff brought this action upon a judgment of the district court of the state of Nebraska. Defendant made default, and judgment was rendered against

106 148
112 624

106 148
119 745

106 148
122 16

106 148
130 728

him. Thereafter, by petition, he set up that he had been prevented by unavoidable casualty and misfortune from appearing and making defense, and prayed that the default and judgment be set aside. Later, an amendment was made to the petition, and to the pleading, as amended, a demurrer was filed by plaintiff. The court overruled the demurrer, and, after a hearing, set aside the default and judgment, and dismissed plaintiff's petition. From this order and judgment the plaintiff appeals.—*Reversed.*

H. S. Winslow for appellant.

W. O. McElroy for appellee.

WATERMAN, J.—The judgment upon which plaintiff's action is based was rendered by the district court of Chase county, Neb., and the transcript thereof, which is attached to the petition in this case, discloses that jurisdiction was taken by that court upon the following return of service: "I hereby certify that on the 17th day of July 1893, I served the within writ of summons on the within-named S. Dixon, by leaving for him at his usual place of residence, in Douglas county, Nebraska, a true and duly certified copy thereof, with all indorsements thereon, as required by law. George A. Bennett, Sheriff Douglas County, Neb." After default made and judgment entered in the present action, defendant instituted a proceeding to vacate said judgment, under subdivision 7, section 3154, of the Code of 1873, alleging the facts which he claimed amounted to unavoidable casualty and misfortune, and setting out a defense which he had to the original claim sued upon. He also alleged that he never was a resident of the state of Nebraska, that the return of service on the summons from the Chase district court was false, and that no notice of said action was ever served upon him.

II. Evidence was introduced and a hearing had upon this application. We may, for present purposes, admit that the facts alleged by the defendant in excuse for his non-appearance in the Jasper district court (and which we need not set out) constituted an "unavoidable casualty and misfortune," within the meaning of those terms as they are employed in the statute; and we may also assume that the showing in support of the plea *nul tiel* record was sufficient to open the Nebraska judgment, and admit of a defense being interposed to the merits of plaintiff's claim.

III. It is provided in section 3159, Code 1873, "The judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment is rendered." This section has been construed in the following cases, among others: *Brewer v. Holborn*, 34 Iowa, 473; *Dryden v.*

Wyllis, 51 Iowa, 534. But counsel claims that
1 defendant was obliged to exhibit no defense, save that of *nul tiel* record, in order to bring himself within the terms of this statute. This position is not tenable. While the action was upon the judgment of the Nebraska court, yet, if a plea to the judgment had been held good, plaintiff could still have maintained an action upon the original cause. 2 Black, Judgments, 864; *Whittier v. Wendell*, 7 N. H. 257. And under our practice this might have been done by an amendment in this case. The proper inquiry on the application to set aside this judgment was not whether defendant had a technical defense to plaintiff's claim in that form, but, rather, whether he could show facts which would reasonably indicate that he was not indebted to plaintiff. The purpose of section 3159 is to avoid opening a judgment unless it appears to be in the interests of justice to do so. Before the court acts favorably upon an application of this kind, it should find that plaintiff

probably has secured an undue advantage, not in name, but in fact. As an illustration of the disinclination of the courts to disturb settled controversies without a showing of substantial merit on the part of the applicant, we cite *Gerrish v. Hunt*, 66 Iowa, 682. Notwithstanding the claim of counsel, an attempt is made to present a showing of merit for defendant, and the facts set out are as follows: Defendant was the agent in Nebraska for the Norwegian Plow Company, and as such received from the firm of A. C. Pence & Co., debtors of said company, a check payable to 'S. Dixon, Agt.,' and drawn on the Bank of Wauneta. Defendant indorsed the check, 'S. Dixon, Agt.,' and gave it to Pence, saying that he wished a draft to use, instead of a check. Pence procured a draft which defendant took. It is disclosed in the exhibits to the petition that plaintiff bank is the owner of the check, which is the foundation of the present claim. On the hearing to vacate the judgment it was also established that Pence used this check to purchase of plaintiff the draft which he gave to defendant. Would these facts constitute any defense to plaintiff's claim? If not, then the trial court was not warranted in setting aside the judgment.

IV. It is claimed by defendant that the facts show the check was surrendered to Pence. But it is a third party who is asserting rights here based on that instrument, and there is no evidence of any knowledge on its part that Pence lacked authority to put it in circulation, if, indeed, such was the case. It is not contended
2 by defendant that the character of his indorsement relieved him from personal liability. Such a contention, if made, would be readily disposed of by the prior decisions of this court. *Matthews v. Mattress Co.*, 87 Iowa, 246; *Lee v. Percival*, 85 Iowa, 639, and cases cited. It is not necessary, in order to hold defendant personally liable on his indorsement, that we go to the

extreme of the rule announced in these cases, and we do not wish to be understood as so doing. We cite these authorities because the principle we apply is included in the doctrine they announce. The rule to which we here give our sanction is well stated in 1 Daniel, Negotiable Instruments, section 301. We are aware that the trial court was not called upon to weigh the evidence nicely in order to determine whether a defense was made out. *Insurance Co. v. Granger*, 62 Iowa, 272. But in this case the facts, as shown, are wholly insufficient to bar a recovery on the check. They do not tend to show that defendant is not indebted to plaintiff. Our conclusion is that the trial court erred in setting aside the judgment, and in dismissing plaintiff's action. Its judgment is therefore REVERSED.

STATE OF IOWA, Appellant, v. E. E. ALVERSON.

Indictment: EMBEZZLEMENT. An indictment for embezzlement by an attorney, of money entrusted to him by a client, need not set out the kind or character of the money embezzled, under Code, 1873, section 4817, providing that in an indictment for embezzlement it shall be sufficient to allege the embezzlement to have been of money generally, without designating its particular species.

SAME. An indictment alleging that defendant had fraudulently embezzled "the sum of \$400.00" of the money received by him as attorney at law, sufficiently states that the value of the property alleged to have been embezzled, exceeds twenty dollars.

Appeal: FINAL JUDGMENT. An order sustaining a motion in arrest of judgment filed by one guilty of embezzlement and ordering him to be held to appear before the next grand jury is a final judgment from which the state may appeal.

Appeal from Iowa District Court.—HON. M. J. WADE,
Judge.

FRIDAY, APRIL 8, 1893.

106	152
106	411
106	668

106	152
118	493

106	152
127	291

106	152
131	678

INDICTMENT for larceny. Trial to jury, and a verdict of guilty. Defendant filed a motion in arrest of judgment, which the court sustained, and the state appealed. —*Reversed.*

Milton Remley, Attorney General, for the State.

Hedges & Rumple and *C. S. Lake* for appellee.

GRANGER, J.—The defendant is an attorney at law, and was in the employ, as attorney, of Rosanna Meritt, executrix of the estate of M. Meritt, deceased; and the indictment is laid under section 3909 of the Code of 1873, as follows: "If any attorney at law, collector or other person, who in any manner receives or collects money or any other property for the use of and belonging to another, embezzles or fraudulently converts to his own use * * * any money or property of another, * * * he shall be deemed guilty of larceny and punished accordingly." The indictment charges that E. E. Alverson, at and within said county, * * * "did then and there, by virtue of his said employment as attorney at law of Rosanna Meritt as executrix of the estate of M. Meritt, deceased, have, receive, and take into his possession as attorney at law as aforesaid, on or about the following dates, to wit." Then follows a statement of different amounts of money received, with dates, and then as follows: "Said sums amounting to a total of \$1,474.02; the particular description of said money being to this grand jury unknown; and being the property and moneys of the said Rosanna Meritt as executrix of the estate of M. Meritt, deceased, the said defendant's employer as attorney at law. That on or about the fifth day of February, 1897, and within three years prior to the finding of this indictment, he did then and there unlawfully, feloniously, and fraudulently

embezzle and convert to his own use, without the consent of the said Rosanna Meritt as executrix of the estate of M. Merritt, deceased, his employer, the sum of four hundred dollars of the moneys above received by him as such attorney at law, and belonging to Rosanna Meritt as executrix as aforesaid, by means of which the said E. E. Alverson is deemed to have committed the crime of larceny." The objection to the indictment

1 ment is that there is no allegation that the value of the property alleged to have been embezzled exceeded twenty dollars. There is no such averment in terms, but, if stated in terms, it would be no more conclusively pleaded than it now appears. The indictment surely charges that four hundred dollars of money was embezzled. Had the property embezzled been other than money, its value would have been its worth in money; and in determining the fact of its value there would be no inquiry as to the value of the dollars of money, but the inquiry would be, how many dollars is the property worth? and its value thus fixed would be the lawful value for the purpose of fixing the grade or degree of the crime. "The money of account of this state is the dollar, cent, mill, and all public accounts and the proceedings of all courts in relation to money shall be kept and expressed in money of the above denominations." Section 2075, Code 1873. The foregoing section, were it not otherwise the law, requires the averment as to the value in an indictment to be expressed in dollars or denominations fractional thereof. We do and must assume that the word "money" in the indictments means the same as the word "money" in the statute. To say in an indictment, in effect, that a dollar is of the value of a dollar, would be meaningless, and hence useless. For such purposes the law fixes the value of the dollar of money, makes it the standard of measurement, and to require proof that a dollar is of the

value of a dollar is as unreasonable as to require proof that a pound weighs a pound. A somewhat conclusive test of what should be in the indictment as to the value would be the proof necessary to sustain the indictment. If the proof should be that defendant stole or embezzled one hundred dollars of money, the state surely would not be required to add proof to show that one hundred dollars of money taken was worth one hundred dollars of money. The only basis for argument or criticism against the indictment comes from an express or tacit assumption that what was taken might be of less value than money in its legal sense. We deal now with the averments of the indictment, in which we give the words "money" and "dollar" their statutory meaning, because used to express that meaning. Whether the proofs would sustain the averments might be another question, and might be one of fact.

II. It is further urged that the indictment is insufficient in that it contains no allegation of the kind or character of the property received by defendant, or embezzled by him. The argument indicates that
2 what is meant is that the money should be described as to its kind or character. This is an indictment for embezzlement, so committed as to be deemed larceny and punished accordingly; and, being embezzlement, it comes within the provisions of section 4317, Code 1873, as follows: "In an indictment for the embezzlement or fraudulent conversion of money, it shall be sufficient to allege the embezzlement or fraudulent conversion to have been of money generally, without designating its particular species; and proof that the defendant embezzled, or fraudulently converted, any money or bank notes, will be sufficient to support the averment, although the particular species be not proved." It is difficult to add anything to the conclusiveness of the section itself. The indictment alleges

the embezzlement to have been of money, generally, and the statute says that is sufficient without designating its particular species; that is, it is not necessary to specify it as being gold, silver, or paper. The averment of money, generally, is sufficient. Then the proof must show that it was money of some kind, or bank notes; and such proof supports the general averment as to money, without proving the particular species. We think the indictment sufficiently states the offense.

III. It is said this court is without jurisdiction because there was no final judgment in the case. The record shows that the court sustained the motion in arrest of judgment, and ordered the defendant held to appear before the next grand jury. The ruling on the motion put an end to all proceedings on that indictment. But for the order requiring him to be held for appearance before the next grand jury, a discharge would have followed the ruling on the motion. In fact, the ruling did operate to discharge the defendant from further prosecution in the pending case, and it was a final adjudication of the rights of the parties in that action, and hence it was a judgment. Section 2849, Code 1873. We assume from the abstract that the records of the district court show the order sustaining the motion, and also the order committing the defendant to bail to await further action by the grand jury. As it was a final adjudication in this case in the district court, it was a judgment, in legal contemplation. The legal effect of the ruling was that no cause of action existed, and that was determinative of every question involved on the trial. No particular form is necessary to a judgment. *Taylor v. Runyon*, 3 Iowa, 474. If the record entry is such that the law, when applied to it, grants or denies the relief sought, it is a judgment. In this case the law gives such effect to the record entry as to discharge the defendant

from further appearance to the indictment. That it is the duty of the court to order the defendant discharged, where the facts stated in the indictment do not constitute a punishable offense, when not held for further appearance, see Code 1873, section 4450. Our conclusion is that the court erred in sustaining the motion in arrest of judgment, and its action in so doing is REVERSED.

NATIONAL HORSE IMPORTING COMPANY V. F. H. NOVAK,
et al., Appellants.

Instruction Construed: IMPLIED WARRANTY. In an action to recover the price of a stallion, an instruction that, if defendant purchased said horse for breeding purposes, which was known to plaintiff, and the horse was not suitable for that purpose, then there would
2 be a partial failure of consideration, and, if so, the jury would have to determine how much less he was worth by reason of such failure, submits to the jury in effect, the question of implied warranty.

False Representation: SCIENTER. A failure of evidence tending to show scienter justified a court in refusing to submit to the jury
3 the issue of false and fraudulent representations in the sale of a horse, in an action to recover the purchase price thereof.

Amendments: DISCRETION. Leave to file an amendment setting up an entirely new and distinct issue of which applicant knew all time
1 may properly be refused in the discretion of the court, when asked at the conclusion of the evidence on a second trial, no good reason appearing for not filing the same earlier, and the refusal being, moreover, without prejudice.

Bill of Exception: TIME OF FILING. A bill of exceptions filed March 31st, is filed in time where the verdict was rendered the preceding December 2d, and a motion for new trial was filed December
5 14th, and submitted January 4th, and overruled March 7th, at which time the court by consent of the parties allowed sixty days to prepare and file the bill of exceptions. Time so given is computed from the date of making the order and not with reference to the term at which the case was tried.

New trial: NEWLY DISCOVERED EVIDENCE: Discretion. A new trial should be granted to defendant in an action on a note, for newly discovered evidence that a given stallion was sold to defendant at the time the note was dated, that such stallion was not a good

- 4 breeder and that plaintiff's agent knew such fact from actual observation and from statements made to him by persons who had bred their mares to the horse and that such agent had made admissions that he had had "trouble" with the stallion, though the granting of such new trial rests largely in discretion.

Appeal from Johnson District Court.—HON. M. J. WADE,
Judge.

FRIDAY, APRIL 8, 1898.

ACTION at law upon a promissory note made and executed by defendants, F. H. and Frank Novak. Defense, false and fraudulent representations and breach of warranty in the sale of a stallion for a part of the purchase price of which the note was given. Defendants also plead a counter-claim for breach of warranty. Trial to a jury. Verdict and judgment for plaintiff, and defendants appeal.—*Reversed.*

Bailey & Murphy for appellants.

Ranck & Bradley, John J. Ney and Hubert Remley for appellee.

DEEMER, C. J.—The appellants, or one of them, purchased two stallions of appellee, one known as "Prince Rupert," and the other as "Harvester"; and one of the issues in the case was as to which horse the note was given for. The jury found specially that it was given for "Prince Rupert," and that appellant Frank Novak, Sr., signed the note as surety only. Appellants contend that the evidence shows without dispute that the note was given for "Harvester." We do not agree with them in this contention. The evidence was in conflict, and the finding is not without support.

II. There were two trials of the case, and at the conclusion of the appellants' evidence upon the last trial, defendant Novak, Sr., offered an amendment

to his answer pleading that he signed the note as surety after it had been fully executed and delivered, and that there was no consideration for his contract. The only excuse for not filing it at an earlier day was that he was unacquainted with legal proceedings, and supposed his attorneys had obtained knowledge of the facts, and had filed such an answer. The trial court refused to consider the amendment, and of this complaint is made. While the rule is to allow amendments, and to refuse them the exception, yet the trial court is necessarily vested with a large discretion in such matters, and this court will not interfere in the absence of a showing of legal abuse of this discretion. *Heusinkveld v. Insurance Co.*, 96 Iowa, 224. There is no such showing in this case. The amendment tendered an entirely new and distinct issue after the case had once been tried, and at the conclusion of defendant's evidence upon the second trial. No good reason appears for not filing it before that time. Indeed, it appears that defendant knew of the defense at all times, and that either he or his counsel were negligent, or that they had a "masked battery," which they did not uncover until the last moment. In either event the trial court was justified in not considering it. Moreover, the jury specially found the note was given for the stallion "Prince Rupert," and not for "Harvester." If it was so given, then it clearly appears from the evidence that it was signed by Novak, Sr., at the time of the trade, and upon an express agreement that it should be so signed; so that, in any event, there was no prejudice in refusing the amendment.

III. Error is predicated upon the alleged refusal of the court to submit the question of implied warranty to the jury. If it be conceded that the pleadings raise

such an issue,—a proposition which is by no means free from doubt,—yet we find that

2 the court gave the following instructions:

“(24) It is the law that, if defendants purchased said horse expressly for breeding purposes, and the company knew the purpose for which he was being bought, and knew that the defendants were buying and fixing the price upon him with reference to that express purpose, and if he was not reasonably suitable for the purposes for which he was bought and sold as aforesaid, then there would be a partial failure of consideration, and the same is properly urged as a defense herein.” “(26) Now, the purchase price of the horse ‘Harvester’ was \$600, and for the purpose of this defense you will have to consider the \$400 not represented by this note as paid; and if, as aforesaid, there was a failure of consideration because he was not reasonably suited for the purposes for which he was bought and sold, you will have to determine how much less was he worth by reason of such failure than the purchase price \$600; that is to say, the purchase price being \$600, how much, if any, less than that amount, was he worth by reason of the defects complained of?” These instructions were in line with the one asked by appellants, and while they do not, in terms, relate to an implied warranty, yet such is clearly their effect; and the fact that the court said that such defense would, if established, amount to a partial failure of consideration, does not alter the case. The jury evidently found there was no implied warranty, and no prejudice resulted from the court’s failure to state that the breach of such a warranty might be considered the basis for a counterclaim. Aside from this, however, the answer was much like the pleading filed by the defendants in the case of *Humbert v. Larson*, 89 Iowa, 258, wherein we held that no implied warranty was pleaded. We are

not called upon to determine whether, under the facts as claimed by appellants, there was an implied warranty.

IV. Appellants pleaded false and fraudulent representations in the sale of the horse "Harvester." The trial court directed the jury not to consider this issue, and of this complaint is made. That appellee's
3 agent stated that the horse was a good breeder at or about the time he sold him is conceded, but we think there was such a failure of evidence tending to show scienter as that the court was fully justified, under the rule announced in *Meyer v. Houck*, 85 Iowa, 319, in refusing to submit this issue to the jury.

V. One of the grounds of the motion for a new trial was newly-discovered evidence. The affidavit of the witness whose evidence it is claimed was newly discovered discloses that he had charge, as agent and servant, of appellee, of the stallion "Harvester," with others, during the year 1889 and a part of the year 1890, and that said stallion was sold to appellants at the time the note in suit was dated. This affidavit further shows that the stallion was not a good breeder, and that the agent of appellee who sold him knew of that fact from actual observation, as well as from statements made to him by persons who had bred their mares to the horse. It also appears that this same agent made statements to the witness in which he admitted that
4 they "had had trouble with 'Harvester.'" This evidence would be so clearly competent on the issue of false and fraudulent representations that no space need be taken for the discussion of that question. The showing of diligence in attempting to obtain this evidence is sufficient, and we are constrained to hold that, while the matter of granting a new trial upon such a ground is largely a matter of discretion in the

trial court, yet that the motion in this case ought to have been sustained.

VI. Appellee has filed a motion to strike the evidence from the record, for the reason that the bill of exceptions was not signed and filed within the time allowed by law. The jury returned their verdict
5 on December 2, 1895. On December 14th, defendants filed their motion for a new trial. This motion was amended from time to time, and was not submitted to the court until the next term succeeding the one at which the case was tried. January 4, 1896, the motion was submitted, and on March 7th it was overruled. At the time of the overruling of the motion judgment was entered on the verdict; and on the same day, by consent of parties, the court gave defendants sixty days to prepare and file a bill of exceptions. The bill was signed and filed March 31, 1896. The claim that the bill should have been filed with reference to the term at which the case was tried is without merit. *Etter v. O'Neil*, 83 Iowa, 656. The motion is overruled.

Other matters presented in argument need not be considered, for they will not arise upon a re-trial. For the error pointed out, the judgment is REVERSED.

STATE OF IOWA V. LEONARD W. HEALY, Appellant.

Murder: SUFFICIENCY OF EVIDENCE. Two policemen were shot in cer-
1 tain railroad yards. One was killed outright, but before the other expired he indicated by signs that they had been shot within a passenger coach, by two men who had escaped. A witness saw two men run away immediately after the shooting, and their tracks were found. He was eight and one-half feet from the men, and identified one as R., and described the other as of size and dress similar to defendant. A window in the coach was broken out, which a witness heard done immediately after the shooting, and there were blood stains on the coach. The bullets shot were thirty-eight caliber, and a thirty-eight caliber revolver was found next day not far from the coach. It was of blue steel, and bloody, and

bullets therein were battered at the ends. Two nights before the killing defendant was at an hotel, where the clerk took from him a blue steel revolver and in removing the bullets therefrom he battered the ends. The clerk returned the revolver the next morning with the bullets replaced, defendant claiming it as his property. The clerk identified the revolver found as that of defendant. Defendant and R. robbed several people on the night previous to the shooting, and the policemen killed were notified of this fact. Defendant and R. were seen together after the shooting at different times and places until arrested. When arrested, they were told that they answered the description of the persons who killed the policemen, and were arrested for that reason. Defendant instantly inquired with anxiety whether both were dead. He also admitted being at said hotel on the night mentioned, and that his revolver was taken from him. *Held*, that the evidence supported a conviction for murder.

EVIDENCE. Evidence that defendant, charged with murder of special policeman and two other persons had held up different persons shortly before the crime was committed, is admissible to show that such policemen had the right to arrest them, and that defendant had a motive to resist.

Same. Evidence that a special policeman for whose murder defendant is on trial, said a short time before the crime was committed that he was looking for some persons who were "holding up" people in the neighborhood, and that they could not be far away, is admissible to show what such policeman was doing at the time of the murder.

Appeal from Dubuque District Court.—HON. JOHN J. NEY, Judge.

FRIDAY, APRIL 8, 1898.

LEONARD W. Healey, Hugh Robbard, and James Kent are accused in the indictment of having murdered Theodore Frith, April 14, 1893. The defendant Healey had a separate trial, and, upon conviction, was sentenced to imprisonment in the penitentiary for life. He appeals.—*Affirmed*.

No argument for the state or the defendant.

LADD, J.—On Friday morning, April 14, 1893, at about 2 o'clock A. M. Theodore Frith and Henry Talcott, special policemen of the Chicago, Milwaukee & St. Paul Railroad Company, were shot and killed in its yards at Dubuque. When found, Talcott was
1 lying dead on the platform at the north end of the passenger coach No. 117, and the bullet, which had passed into his eye and through the brain, was found in the car. Frith was shot in the mouth, and was about two hundred feet from this coach. He was unable to talk, and made himself understood by signs only. He motioned to the passenger coach, pointed to the body of Talcott, and indicated by signs that both had been shot by two men within, and that these men had gone out of the south end towards the street. Immediately after doing this he expired. The bullet entering him was broken in two pieces, and undoubtedly caused his death. A ball also passed along his back without serious injury. Three shots were heard. William Luther saw two men, immediately after the shooting, run around the corner of a stock car near by and over a cinder dump. The headlights of two engines, about three hundred feet away, were turned somewhat in that direction. He was eight and one-half feet from the men when passing, but able to identify Robbard, who stopped and looked at him, as one of them, and describes the other as of size and dress similar to that of Healey. The window in the south end of the car was broken out, and this was heard done by one of the witnesses immediately after the shooting, and there were blood stains on the door post, and also on the steps of the platform. The door was fastened and cushions piled against it as though made for a bed. Near the other end of the car the seats had been turned and the cushions laid lengthwise. These cushions were bloody, and the bull's eye of

a lantern and a chisel were lying near by. The half of a cigar was also found. A fire had been built in the stove, and the kindlings were not all consumed. The tracks of two men were traced from the south end of the passenger coach around the corner of the stock car, where seen by Luther, and over the cinder dump. The bullets were 38 caliber, and a 38-caliber revolver was found the next day in a pile of flues near the boiler house, not far from the coach referred to. This revolver was of blue steel and bloody. The bullets therein were battered at the ends. The accused were at Shea's Hotel Wednesday night, and Humble, the clerk, took from Robbard three revolvers. One of these was of blue steel and in removing the bullets therefrom Humble battered the ends. When he returned them, with the bullets replaced, on the following morning, Robbard kept a 38-calibre, and turned this one over to Healey, who had already claimed it as his own property. In that found the bullets were also battered, and Humble identifies it as that of Healey as positively as such articles may be. Between ten and eleven o'clock Thursday night these three men are proven to have held up Jones, a call boy in the employ of the Illinois Central Railroad Company, David McDonald, and Henry Geiger, and of attempting to hold up M. S. Hardie. In these transactions Healey drew his revolver and compelled his victims to hold up their hands, while the others went through their pockets. The occurrences were promptly reported to the police and search immediately begun. Frith and Talcott were notified of the facts, given a description of the men and asked to keep watch for them, by the marshal. They immediately began searching the yards of the Chicago, Milwaukee & St. Paul Railroad Company. Two strangers were seen going towards coach No. 117 about five minutes before Frith and Talcott went in that direction and only a few minutes before the

shooting. Three were seen in that vicinity, the one separated from the others. Robbard and Healey were seen together at Peosta, about eight miles from Dubuque, early on the morning, and at Epworth about noon, of the day after the shooting. The marshal at Epworth pursued them, and they refused to obey his orders to surrender, although fired upon. They are shown to have been together at different times and places until finally arrested, on Sunday, near Greeley, by the city marshal of that place. The defendant Healey was told by Baxter, a detective, for the first time on Monday, that the two answered the descriptions of the persons who had killed the policemen at Dubuque, and for this reason they were arrested. Healey instantly inquired with anxiety whether both were dead, wanted the description, and then refused to talk further, for fear of criminating himself. He mentioned, however, that he had been at Shea's Hotel on Wednesday night, and of having trouble there, in which his revolver was taken from him while asleep, and also said he had sold it in Dubuque Friday morning for one dollar and twenty-five cents, though he was unable to say where or to whom. The accused had been in Dubuque since Monday before the killing without any known business, and guarded against making acquaintances. These are substantially the facts upon which conviction was had. The defendant did not speak in his own behalf. When the evidence had been introduced, by motion, and also an instruction, the court was asked to direct the acquittal of the defendant because of the alleged insufficiency of the evidence. The facts shown, unexplained, might well lead to the conclusion that Healey was associated with Robbard in the commission of the crime. There was no question but that he was with him until eleven o'clock that evening, had been engaged with him in the commission of the crimes of robbery, and had the same

motive for concealing his whereabouts and in resisting arrest when pursued. Luther, though not identifying him, correctly describes him when passing the car with Robbard. The finding of the bloody revolver near the scene, with the battered bullets corresponding with Healey's is a remarkable coincidence, even though there is no positive identification. The evidence shows that these men were together fleeing from Dubuque from early Friday morning till arrested. The anxious inquiry of Healey whether both were dead, indicated personal knowledge of the transaction on his part, for had he learned elsewhere, the death of both would have been known. The evidence was such that the jury might conclude that the defendant either killed or aided and abetted Robbard in the murder of not only Frith, but Talcott as well.

II. We have only the record of the conviction and the bill of exceptions before us and are unaided by argument. A careful examination of the record, however, convinces us the defendant's rights were fully guarded. The attorney appointed by the court to defend Healey presented all proper objections and carefully protected the record. M. F. Kelly when on the stand was asked this question: "At the time that Frith asked
2 you if you had seen any parties, what, if anything further did he say as to who the parties were or what he wanted with them?" And over the objection of the defendant answered: "Why, he told me that he was looking for some parties that were holding up people around there, and he stated that they were holding up people around the city, and that he said that he thought they couldn't be far away, and he said he understood they were in the yard, and he said they couldn't be far away." This occurred about ten minutes before the shooting. Similar questions were asked Smith

and Williams, and like answers permitted. These rulings are vindicated by the eleventh instruction, wherein the jury were told: "The evidence was admitted under the rule that what Frith and Talcott said was a part of what they were doing, and explanatory of it, and for no other purpose, and what Frith and Talcott were doing at this time is a matter proper for you to consider with the other facts in the case established by the evidence."

III. The witnesses Jones, McDonald, Geiger, and Hardie were permitted to testify, over the objection of the defendant, that Healey, Robbard, and another had held them up between ten and eleven o'clock previous

3 to the killing. Again, the ground for receiving this evidence is clearly stated by the court in its sixth instruction, wherein it is said: "This evidence has been admitted in this case, not to show that the accused are bad men, devoid of a proper sense of social duty, and therefore more likely than other or better men to have killed Frith, but to show that Frith, if he was attempting to arrest the accused, had the right to do so, and that the accused had a motive to resist such arrest. Frith and Talcott were private citizens, and not officers, and, to justify them in attempting to arrest the accused, it must appear from the evidence that the felony of robbery, or attempt to rob, had been committed by the accused, and that Frith and Talcott had been informed of that fact, and had reasonable grounds to believe that the accused were guilty thereof." The relative duties and rights of the deceased and the accused were then defined in event an arrest were attempted. This undoubtedly correctly states the law, and the circumstances shown warranted the introduction of the evidence and the instruction given.

IV. We have noticed the main errors pointed out in the motion for a new trial. There are forty-six grounds set out in this motion, and we have examined each one

with care, and find no error prejudicial to any right of the defendant. The instructions given include those requested, in so far as correctly stating the law applicable to the case, and are as favorable to the defendant as he had the right to have them. The judgment must be affirmed.—AFFIRMED.

STATE OF IOWA v. E. J. CHINGREN, Appellant.

False Pretenses: SCIENTER: Evidence. In a prosecution for cheating by pointing out to prosecutor a wrong tract of land in a transaction where land was traded for goods, evidence that defendant had pointed out the same land to another, and said that about twenty acres of it was in the slough, is admissible on the question of knowledge, where defendant testified that he did not know the corners and lines of the land which he was trading.

Matters of common knowledge. Evidence that it is the custom to mark up the price of land when it is being traded for goods is properly excluded on a trial for cheating by false pretenses, as it is a matter of common knowledge that in the making of exchanges of property the prices are not fixed at cash values.

Admissions. Evidence that defendant charged with obtaining a stock of merchandise by false pretenses had stated to a specified witness soon after the trade, that he had invoiced part of the goods and that they amounted to nine hundred dollars is admissible to rebut evidence by defendant that the goods were of little value.

Same. Evidence of statements made by defendant showing the value of goods which he is charged to have obtained by false pretenses is admissible without laying a foundation, as he is a party to the action.

CROSS-EXAMINATION. Defendant charged with cheating by false pretenses in pointing out as his wife's land which he proposed to exchange for a stock of goods, other land of better quality, may be cross-examined as to whether any money was paid by either him or his wife for the land given in exchange for the goods and as to whether a mortgage given by them on the land was a sham, where he testifies on his examination in chief that his wife owned the land and that there was a mortgage on it, and that the mortgagee went with him to examine certain property with a view of changing the security from the land.

SAME. On cross-examination in criminal cases, inquiry may be made concerning defendant's different occupations and places of resi-

105	169
111	441
105	169
115	681
105	169
117	230

3 dence, the extent to which such inquiry may be carried, resting in
the sound discretion of the court.

Rule applied. A question asked of defendant on cross-examination
in a criminal trial as to the business he conducted at a given fair
3 is not improper, although the answer shows that he was engaged
in a gambling occupation.

Harmless error. Defendant in a criminal trial is not prejudiced by
the question put to him on cross-examination whether a certain
3 business institution which he had testified he had conducted
was a gambling institution, where such question was immediately
withdrawn.

Impeachment: Court and jury. An instruction as to what weight
impeaching evidence shall have as affecting defendant's credi-
bility, and what weight shall be given his testimony, and under
6 what circumstances his testimony may not be rejected entirely, is
proper, as such evidence may affect defendant's credibility, and
not warrant a rejection of his testimony entirely; and under such
circumstances the extent to which his credibility is impeached is
for the jury.

Same. Defendant is not prejudiced by an instruction which requires
7 the state to prove more than the law requires.

INDICTMENT: Variance. It is not a fatal variance in a prosecution for
cheating by pointing out a wrong tract of land, where it is alleged
7 that defendant pointed out the land in question as belonging to
him, that the proof was that he said it belonged to his wife; since
there might be a conviction on the further allegation that defend-
ant pointed out a tract owned by neither him nor his wife.

Same. Where an indictment for cheating charged that prosecutor did
"bargain and trade and set over and deliver" unto defendant a
stock of goods, which was received by him and taken into his pos-
7 session, and the evidence was that the bargain was made with the
defendant, and delivery made to him, there was no variance though
the bill of sale was delivered to defendant's wife, it having been
done at his request since the fact that the defendant was acting for
his wife was not sufficient to relieve him from responsibility for
his unlawful act.

Appeal from Webster District Court.—HON. P. B. BIRD-
SALL, Judge.

FRIDAY, APRIL 8, 1898.

THE defendant was convicted of the crime of cheat-
ing by false pretenses, and from judgment sentencing

him to imprisonment in the penitentiary for three years he appeals.—*Affirmed.*

Wright & Nugent for appellant.

Milton Remley, attorney general, and *Jesse A. Miller* for the state.

LADD, J.—On or about August 28, 1895, T. J. Conners was the owner of a stock of merchandise kept in a building of his father at Barnum, Webster county, and the wife of the defendant was the owner of the west one-half of the northwest one-quarter of section 8, in township 90 N., of range 34 W of fifth P. M., in Pocahontas county, subject to a mortgage of one thousand dollars. The defendant, acting for his wife, exchanged this land, at a valuation of two thousand dollars, to Conners for the merchandise at the valuation of one thousand, two hundred dollars, and the building and lot were kept at one thousand dollars. A release of the one thousand dollar mortgage was procured by executing mortgages for the same amount on the merchandise and store building, and defendant and wife executed to Conners a note and mortgage for the difference of two hundred dollars. It is charged in the indictment that to induce Conners to make this trade, and part with his stock of goods, the defendant knowingly and with the intention of defrauding pointed out to him the east one-half of the northwest one-quarter of the northwest one-quarter, and the west one-half of the northeast one-quarter of the northwest one-quarter, of section 8, and forty acres just north of the same, being high, rolling prairie, worth about two thousand dollars, and represented it to be the west one-half of the northwest one-quarter of said section, which was variously estimated to be worth from three hundred dollars to one thousand, two hundred dollars. The land exchanged was swampy,

and covered with cane brake, and contained not to exceed fifteen or sixteen acres arable in character.

I. The defendant sought to prove that when real estate is being traded for goods it is the custom to mark up the price of land. The evidence was properly excluded. It is a matter of common knowledge
1 that in making exchanges of any property the prices are not fixed at cash values. The law permits those selling or exchanging to brag on their property, and to obtain the highest price possible to secure fairly and honestly. This is generally known, and there was no occasion to prove that men sometimes ask more for a thing than it is worth.

II. P. A. Anderson was permitted to testify that he was out to look at the land with defendant, and that the latter pointed out to him a certain southeast corner of land and told him about twenty acres of it was slough. The evidence of this witness is rather vague, but tended to show that the same land was pointed out, alleged in the indictment to have been shown Connors as the west one-half of the northwest one-fourth of section 8. The
2 defendant, in his testimony, claimed that he did not know the corners and lines of his wife's eighty, and this evidence was admissible on the question of knowledge. It tended to show that he knew the corners and lines, and was claiming the land shown Connors as his own. For what purpose Anderson looked at the land does not appear, and for this reason the authorities cited by both parties concerning proof of similar offenses are not applicable.

III. This is a part of defendant's cross-examination: "Q. What was your business in connection with country fairs at different places? A. I never was outside from home. Q. Well, at the Fonda Fair. What business did you have with the fair there? A. I ran a

bowery at one time. Q. Did you run anything else? A.

I ran a jewelry spindle at ore time." He was
3 then asked whether that was a gambling institution, but this was withdrawn upon objection, and the question, "What is the spindle you speak of?" not permitted to be answered. It has often been held that on cross-examination inquiry may be made concerning a defendant's different occupations and places of residence. *State v. Pugsley*, 75 Iowa, 743; *State v. Row*, 81 Iowa, 138; *State v. Watson*, 102 Iowa, 651. The extent to which such inquiry may be carried must necessarily rest in the sound discretion of the trial court. The question eliciting the answer concerning the jewelry spindle was not improper. If handling it constituted the crime of gambling, the answer might have been stricken on motion. What it really was does not appear, as evidence of its character was excluded on objection by the defendant. The question as to its being a gambling institution was promptly withdrawn. There was no erroneous ruling, and we do not think the defendant was prejudiced by the question, improper as it was, in view of its immediate withdrawal by the county attorney.

IV. The defendant was also asked: "Q. There was no money passed from you or your wife to Mr. Hughes for that eighty acres? A. No money passed from me. Q. Or from your wife? A. Not that I know of. * * *

Q. That mortgage was a sham mortgage, was it not? A. No, sir." It is insisted
4 this was not cross-examination. The defendant had testified that his wife owned the land, and became such owner in July or August, 1895; that he had no interest in it; that Hughes held a mortgage of one thousand dollars on it, and that the latter went with him to Barnum to examine the building and stock with a view of changing the security from the land. How his

wife became owner was legitimate cross-examination, and this might be directed to circumstances of the purchase price paid. The examination developed the fact of giving the mortgage in payment, and the character of the instrument was directly involved in the inquiry concerning ownership.

V. The evidence of the defendant tended to show the merchandise received from Connors was of little value. When on the stand he was asked whether he had not stated to Kasky, in Barnum, a short time
5 after the trade, that he had invoiced the goods on the east side of the store, and they amounted to nine hundred dollars; and he answered he did not remember such a statement. Kasky was permitted to testify that defendant so told him. This was admissible in rebuttal. While he did not say to Kasky the inventory was correct, his statement, if made, was subject to that inference. Proof of his statements was admissible without laying the foundation, as he was a party to the action.

VI. Exception is taken to the eighteenth instruction, in that it assumes the defendant to have been impeached. Therein the jury are advised they are to determine (1) what weight the impeaching evi-
6 dence shall have as affecting his credibility as a witness, (2) what weight shall be given his testimony, and they are also told under what circumstances his evidence may not be rejected entirely. Such evidence may affect the credibility of the witness, and yet not warrant the rejection of his testimony entirely. Under such circumstances the jury is to determine the extent to which his credibility is impaired. The instruction correctly stated the law.

VII. The indictment alleges that defendant falsely represented he owned the west one-half of the northwest one-fourth of section 8, and pointed out other

land as such land, and as belonging to him. On the trial it appeared that the land described was owned by his wife, and it is said there is a fatal
7 variance between the allegations of the indictment and the proof. The allegation, however, that he had pointed out an entirely different piece of land, and falsely represented it to be this eighty, remained. If the state established this, it was sufficient. An indictment may allege several false pretenses, and, when this is done, proof of some one of them is sufficient to warrant conviction. *State v. Dunlap*, 24 Me. 77; *State v. Mills*, 17 Me. 211; *Webster v. People*, 92 N. Y. 422; *Com. v. Parmeter*, 121 Mass. 354; *Com. v. Meserve*, 154 Mass. 64 (27 N. E. Rep. 997); *Beasley v. State*, 59 Ala. 20; *State v. Vorback*, 66 Mo. 168; 2 Bishop, Criminal Procedure, sections 165, 171. The court, in the fourteenth instruction, informed the jury that, as Mrs. Chingren was owner of the land, representations regarding ownership must be regarded as immaterial. True, the fifth instruction required such proof in order to convict. But the charge must be read as a whole, and, when so read, could not have been misunderstood by the jury. In any event, defendant was not prejudiced by the state being held to prove more than
8 the law required. It is said the goods are alleged to have been sold to defendant, and proven to have been sold to his wife. The indictment charges that Connors did "bargain, trade, set over, and deliver unto the said E. J. Chingren a certain stock of goods, wares, and merchandise, * * * which said stock of goods, wares, and merchandise above described were received by said E. J. Chingren and taken into his possession." The evidence tended to establish this allegation. Though the bill of sale was executed to the wife, this was done at his instance. The bargain was with the defendant, and the delivery made to him. That

he may have been acting for her, or in her behalf, will not relieve him from responsibility for what he did.

VIII. Counsel for defendant urge that the verdict is against the evidence. We shall not review this in detail. On all the material points it is conflicting. The evidence offered by the state, if relied upon, as it appears to have been, furnished ample support for the conclusion of the jury, and its verdict cannot be disturbed. —**AFFIRMED.**

A. N. AND N. A. WHITE v. R. O. GREEN, Appellant.

Corporations: STOCKHOLDERS LIABILITY. The sale, though made in good faith, by a stockholder in a corporation of his stock, only a small part of the par value of which has been paid, does not terminate his liability for the existing debts of the company, under Code, 1873, section 1078, providing that the transfer of shares is not valid except as between the parties unless it is regularly entered on the books of the company, but that such transfer shall not in any way exempt the person making it from any liability of the corporation created prior thereto, and section 1083, providing that nothing contained in such chapter shall exempt the stockholders from individual liability to the amount of the unpaid installments on the stock owned by them or transferred by them for the purpose of defrauding creditors.

Appeal from Polk District Court.—HON. W. F. CONRAD, Judge.

FRIDAY, APRIL 8, 1898.

ACTION at law on a judgment rendered against the Zoological Park Company of Des Moines, Iowa, to recover of the defendant, on account of capital stock of the company at one time owned by him, on which he is alleged to be liable as for unpaid stock. There was a trial by the court without a jury and a judgment in favor of the plaintiffs. The defendant appeals.—*Affirmed.*

Bishop, Bowen & Fleming for appellant.

Dowell & Parrish and *Earl & Prouty* for appellees.

ROBINSON, J.—The Zoological Park Company was organized as a corporation for pecuniary profit, in the year 1889, with an authorized capital stock of two hundred thousand dollars. Before the organization was completed, a syndicate was formed for the purpose of organizing the company, and purchasing a tract of land then owned by L. M. Mann. An agreement was made, by virtue of which the land was conveyed to the company when its organization was perfected. The consideration for the conveyance was twenty thousand dollars in money and real estate, and forty thousand dollars in bonds secured by a mortgage upon the land conveyed by Mann. The company was organized by the members of the syndicate, who issued to themselves capital stock to the amount of one hundred and twenty thousand dollars, for which they paid nothing except the twenty thousand dollars in money and real estate which were transferred to Mann as stated. The certificates of stock recited that the shares therein specified were held "subject to the articles of incorporation of the company and to the terms and conditions printed on the back" of the certificates. On the back of the certificates was printed the following: "This stock is fully paid up, but may be assessed at such times and in such amounts as may be necessary to meet the several payments of principal and interest upon the mortgage incumbrance upon the lands and personal property owned by the company, as such payments become due; said mortgage incumbrance being for the sum of forty thousand dollars. * * * It may also be assessed for the purpose of improving said property, and for other necessary

expenses of the company; all such assessments for purposes other than the payment of the mortgage incumbrance and interest above referred to not to exceed in the aggregate ten per cent. of the capital stock outstanding. * * *

"In September, 1890, the articles of incorporation were so amended as to permit the board of directors to assess the capital stock for the purposes enumerated, at such times and in such sums as might be necessary, to an aggregate amount which should not exceed "the unpaid installments of capital stock outstanding." Assessments for the purpose of making improvements, for incidental expenses, and to make payments on the mortgage debt were made from time to time, and paid. The defendant was not one of the original stockholders of the company, but in March, 1891, he purchased from one H. L. Chaffee 10 shares of the capital stock of the company, each of which was of the par value of one hundred dollars. In August, 1891, the company issued a new series of bonds, a part of which became the property of the plaintiffs. In March, 1892, the defendant sold his stock to one Frick, to whom it was duly transferred on the books of the company. In April, 1894, the plaintiffs obtained in the district court of Polk county a judgment on their bonds, and an execution was issued on the judgment, but no property was found, although demand was made of the last acting president of the company, and the execution was returned unsatisfied. The plaintiffs allege that but two hundred dollars have been paid on the stock which was owned by the defendant, and they seek to recover of him the unpaid portion. The district court rendered judgment against him for the sum of seven hundred dollars and fifty-two cents and costs. This is the second submission of this cause, a re-hearing having been granted after the filing of the opinion on the first submission.

I. It is first contended by the appellant that he purchased the stock in question in good faith, believing that it had been fully paid for, and that he should not be held liable in this action for that reason. It is only necessary to say, in response to that claim, that there is evidence which tends to show that the appellant, at the time he purchased the stock, had such knowledge of the facts in regard to the organization of the company and the consideration for the stock that he must be held to have taken it with notice of the fact that but a small part of the amount which it represented had been paid, and that he might be held liable on account of the debts of the company. The evidence to support that theory is sufficient to sustain the finding of the district court. There is also ample evidence to show that the company has received for the stock but a small part of its par value. See *Wishard v. Hansen*, 99 Iowa, 307.

II. The question of chief importance which we are required to determine is whether the sale of the stock made by the defendant terminated his liability for the debts of the company. The general rule, in the absence of statutory regulation, is that, where a stockholder makes an absolute transfer of his stock in good faith, and a record of the transfer is duly made in the books of the company, the transferrer is thereby released from all liability on account of the unpaid part of the stock for which a call has not been made, and the transferee becomes liable for the part of the stock remaining unpaid. 1 Cook Stock Stockholders & Corporation Law, sections 255, 256; 1 Morawetz Private Corporations, section 159; Thompson Corporations, sections 3221, 3222; Beach Private Corporations, sections 125, 126. But it has been claimed that this rule has been changed in this state by statute, and to ascertain if that claim be well founded it is necessary to examine sections 1078 and 1082 of the

Code of 1873, contained in the chapter which relates to corporations for pecuniary profit. Section 1078 provides that "the transfer of shares is not valid, except as between the parties thereto, until it is regularly entered on the books of the company; * * * but such transfer shall not in any way exempt the person making it from any liability of such corporation created prior thereto." Section 1082 is as follows: "Neither anything in this chapter contained, nor any provision in the articles of incorporation shall exempt the stockholders from individual liability to the amount of the unpaid installments on the stock owned by them, or transferred by them for the purpose of defrauding creditors, and execution against the company may, to that extent, be levied upon private property of any such individual." The provisions we have set out are, in substance, found in sections 692 and 695 of the Code of 1851, and, to be fully understood, they must be considered in connection with the law as it existed prior to their enactment, and the evils which the new law was designed to remedy. Among those evils was the right of a solvent stockholder to transfer his stock to an insolvent person, and thus release himself from liability for existing liabilities of the corporation to the prejudice of good-faith holders of such liabilities. Hence it was enacted that "such transfer shall not in any way exempt the person making it from any liability of said corporation created prior thereto." This eliminated from the effects of such transfers the exemption from corporate liabilities which would otherwise have resulted, and continued the obligation of the transferrer for liabilities of that character which had been created prior to the transfer. The liability of a stockholder is not to the corporation alone, but also to its creditors, and may, in proper cases, be enforced by them; and the effect of the statute was to continue the liability of the transferrer to the creditors

of the corporation as well as to the corporation. The liabilities contemplated by the statute are not merely obligations which are due and payable when the transfer is made. Liability in a legal sense, is the state or condition of one who is under obligation to do at once or at some future time something which may be enforced by action. It may exist without the right of immediate enforcement. 1 Bouvier Law Dictionary; Repalje & Laurence Law Dictionary; Standard Dictionary, 1024; *Railroad Co. v. Clarke*, 29 Pa. St. 146. It is contended, however, that the liability contemplated by section 1078 is that referred to in section 1082, but we do not concur in that view. The words "any liability," of section 1078, refer expressly to corporate liability, and the section continues the obligation of the stockholder, after he has transferred his stock, to pay the unpaid installments of the stock on account of any liability of the corporation which existed at the time of the transfer, even though it was made in good faith. But section 1082 refers more especially to stockholders who have not transferred their stock, and to those who have transferred it for the purpose of defrauding creditors. The section continues the liability of stockholders for unpaid installments on the stock owned by them, notwithstanding the fact that it may have been obtained from others who are also liable for such installments under section 1078; and it also continues the liability of persons who, having owned stock, have transferred it for the fraudulent purpose stated. Such a case might arise where a stockholder has made a transfer of his stock, fraudulent as to creditors, and merely colorable. In that case he might continue to be liable to the corporation for unpaid installments of stock, and might also be liable for corporate liabilities incurred after the fraudulent transfer was made. See *Brundage v. Cheneworth*, 101 Iowa, 256.

The provision might also apply in other cases. The interpretation we have adopted gives force and effect to all of the provisions of sections 1078 and 1082, and is not only authorized, but is required by the rules which govern the interpretation of statutes. The appellant relies upon the case of *Spilman v. Mendenhall*, 57 N. W. Rep. (Minn.) 468, as sustaining the interpretation for which he contends. The statutory provisions considered in that case were as follows: "Sec. 8. But such transfer [of corporate stock] shall not in any way exempt the person making such transfer from any liabilities of said corporation which were created prior to such transfer." "Sec. 9. The private property of each stockholder in any corporation formed as herein provided is liable for corporate debts in the following cases: *First*—For all unpaid installments on stock owned by him, or transferred for the purpose of defrauding creditors." Gen. St. Minn. 1878, chapter 34. The supreme court of Minnesota held that section 9 so far limited the effect of section 8 that the liability of a stockholder for unpaid installment did not continue after the transfer, in good faith, of his stock. Section 8 is, in legal effect, precisely the same as the part of section 1078 which we have considered, but section 9 is unlike section 1082 in that section 9 specifies the cases in which the private property of a stockholder is liable, and those specified do not include the case of a stockholder who has transferred his stock in good faith. Section 1082 does not purport to enumerate the cases in which a stockholder is liable. The interpretation adopted in the *Spilman Case* treats the person who has transferred his stock as still a stockholder within the meaning of section 9. Whether that is a correct interpretation, we need not determine, but content ourselves with saying that the language of section 9 of the Minnesota statute is not the same as is that of section 1082. If it be true,

however, that the meaning and legal effect are the same, we cannot approve the interpretation adopted in the *Spilman Case*. We cited that case in *Calumet Paper Co. v. Stotts Inv. Co.*, 96 Iowa, 147, but only to sustain the conclusion that a stockholder was liable for a debt of the corporation even though it was contracted before he became a stockholder. Nothing decided in the case last cited is in conflict with what we hold in this case.

III. What we have said disposes of the material questions presented for our determination. We do not find any reason for disturbing the judgment of the district court, and it is **AFFIRMED**.

LIZZIE B. ROGERS V. C. S. TURPIN, MARTHA HAM, F. F. LEATHER AND MRS. JOE KELLER, Appellants.

THOMAS JOHNSON V. MARTHA HAM, C. S. TURPIN, BENJAMIN TURPIN, Appellants.

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112	100

Adverse Possession: PAYMENT OF TAXES. No title to the east half of the southwest quarter of a given section of land is acquired by one to whom the east half of the *southeast* quarter of such section
1 has been conveyed, notwithstanding the payment of taxes on the east half of the southwest quarter for more than thirty years, where it does not appear that any mistake was made in the description of the deed.

NOTICE. Inclosing land and leasing it to one who uses it for a pasture, for which purpose alone it was adapted, constitute sufficient possession to put a purchaser of land on inquiry and charge him
2 with notice of the title of the one who inclosed and rented it.

Cloud on Title. A purchaser of an interest in land for certain heirs is entitled to a decree quieting her title to such interest, where
3 a purchaser from other heirs is in possession claiming title to all the land.

Deeds. The grantee in a quitclaim deed of land executed by one
8 who had previously conveyed all her interest, obtains no title where the former grantee is in possession.

Injunction: CO-TENANCY. One in possession of land as a tenant in
4 common, is entitled to an injunction restraining her co-tenants from any interference with such possession.

Appeal from Ringgold District Court.—HON. W. H. TEDFORD, Judge.

SATURDAY, APRIL 9, 1898.

ACTION by plaintiff to quiet the title to eighty acres of land, and the same relief was asked by defendants in their cross-petition. Decree was entered quieting title in the plaintiff, and defendants appeal. The second action was brought to enjoin the defendants from interfering with the possession of the plaintiff's tenant, and a decree entered as prayed, from which defendants appeal. Both cases are submitted on the same record, under an agreement that the conclusion in the second case shall be controlled by the decision in the action to quiet title.—*Modified and affirmed.*

McIntire Bros. & Jamison for appellants.

Henry & Spence for appellee.

LADD, J.—Both parties claim title to the land in controversy, correctly described as the "E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of Sec. 6 in Tp. 68 north, of range 28 west of 5th P. M.," under Thomas Newall, who entered it March 1, 1856. He conveyed to A. Harback, May 13, 1857, and the latter to A. and D. H. Chambers, June 24th of the same year; but these deeds described the land as the "E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of Sec. 6." Upon the death of D. H. Chambers, Eliza J. McGregor conveyed all her interest in his estate to A. Chambers, and these were his only heirs. A Chambers died testate in 1873, willing the land to three trustees, to be held in trust for plaintiff. This will has been admitted to probate in Ringgold county. These trustees conveyed to themselves as trustees of plaintiff, and afterwards, in 1892, John M. Kennedy,

the only survivor, executed a deed to her. Some question is made about the validity of these conveyances by the trustees. As in any event the plaintiff was the *cestui que trust*, we will not inquire concerning the devolution of the title by the trustees from themselves to themselves, or whether authorized by the will, which is not included in the record. All these instruments also describe the land as the "E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ " of the section. The Chambers, the trustees, and the plaintiff have paid the taxes on the east one-half of the southwest one-fourth since 1859, and neither Thomas Newall nor his heirs have claimed any interest therein. Thomas Newall died in 1861, leaving a widow and four children, three of whom are living. The depositions of

1 Mrs. Newall and Mrs. Harback, whose husband, A. Harback, died in 1864, were taken. Both recall that their husbands had land in Ringgold county; and Mrs. Newall, that a deed was given to Harback. But neither one is able to recollect the description, or the circumstances attending the execution of the deeds thirty-seven years previous. Indeed, there is no evidence that any mistake was made in the description. The payment of taxes for many years tends to show that the land was claimed by those making such payments, and the absence of any claim of ownership by the widow and heirs of Newall tended to show that he or they had parted with the title. The case is not like *Matthews v. Culbertson*, 83 Iowa, 434, or *Bacon v. Chase*, 83 Iowa, 521. In the former, the tax deeds under which defendants claimed were regular on their face, and they obtained conveyances and made improvements in good faith, and were induced by Mathews to believe he was making no claim to the land. In the latter the defendants claimed under an administrator's deed, and, owing to the laches of the plaintiffs, they were not permitted

to question the title of defendants who were in possession. Here no title is shown in the plaintiff, and no mistake proven in any of the deeds through which she claims title. The proofs referred to entitle plaintiff to no relief whatever.

II. On the seventh day of January, 1893, however, she obtained a quitclaim deed of the land in controversy from Mrs. Newall and her daughter, Margaret Dawson, and husband, which was placed on record December 26,

1894. At that time the plaintiff was in possession of the land. It was unoccupied until

2 1891, when a fence was constructed by Ham on one side. During the following year it was entirely enclosed by Borum, who used it as a sheep pasture. Laird leased it from March 1, 1893, one year, and during that time used it as a pasture and feed lot for cattle. Johnson took possession March 1, 1894, fenced the land again, and continued to occupy it, keeping thirty-five or forty cattle and horses thereon, up to the beginning of this action. All these parties leased the land of plaintiff, through her agents, and inclosed it under the terms of the leases, permitting removal of fences at their termination. It was uncultivated land, and devoted to the purposes for which it was suited. The acts of ownership over it were those necessary to enjoy its use in its present condition, and acquire the profits it might yield. *Colvin v. McCune*, 39 Iowa, 502; *Dice v. Brown*, 98 Iowa, 297. Such possession was sufficient to put defendants on inquiry, and charge them

3 with notice of her title, if any, to the land. In 1894, Mrs. Newall and Margaret Dawson and husband executed a quitclaim deed to W. M. Ashbrook, under whom the defendants claim. But as they had no interest in the land at that time, and plaintiff was in possession under their former deed, no title passed. It follows that the plaintiff is entitled to a

decree confirming her title in an undivided one-half of the land in controversy.

III. The other heirs of Thomas Newall (Benjamin C. Newall and wife, Ester Neal and husband, and Oscar N. Bell, only heir of Jesse A. Bell, deceased) executed quitclaim deeds to W. M. Ashbrook in 1894. The "h" was included in the name of this grantee by mistake; and he, as "Asbrook," conveyed the land to C. S. Turpin. The latter, after executing a mortgage to Mrs. Joe Keller, conveyed to his mother, Martha Ham. She thereby acquired the legal title to an undivided one-half interest in the eighty acres, and is entitled to a

4 decree quieting her title thereto. The decree of the district court will be modified accordingly.

As the plaintiff was entitled to possession as a tenant in common, the writ of injunction was properly issued, enjoining any interference therewith by the defendants, and the decree in the second case should be affirmed.—MODIFIED AND AFFIRMED.

105	187
133	116

MILO S. MILLS, Appellant, v. JANE T. McCAUSTLAND,
CHARLES McCAUSTLAND AND FRANK P. MILLS.

Specific Performance. EVIDENCE. *Land Contract.* Plaintiff worked for his stepfather seven years after his mother's death, and then was given possession of the land in controversy, which he held until his stepfather died, five years later. Defendant married the stepfather two years after the death of plaintiff's mother, and she
1 testified that, just prior to the marriage, plaintiff told her the land belonged to his stepfather, but plaintiff denied this. Numerous witnesses testified that the stepfather had declared that he had agreed to give the land to plaintiff for his services, and that he did not execute deed, because defendant refused to sign it. *Held*, that plaintiff was entitled to specific performance of an oral contract to convey land.

Contracts: CONSTRUCTION BY PARTIES: *Performance.* When decedent's youngest child was four years old he agreed to convey land to plaintiff if he would assist in caring for decedent's children
2 until they could look after themselves. Plaintiff rendered such

assistance for seven years, when decedent said that plaintiff had earned the land, and gave him possession thereof. *Held*, that decedent being satisfied, his widow could not claim that plaintiff had not complied with the contract.

Devise: PARTIAL RENUNCIATION: Election. A stepfather agreed, upon consideration, to convey certain lands to his stepson and devised that land and other to him, by will. *Held*, the stepson, 3 could, without being put to an election, claim the land conveyed by contract and also willed, under the contract, and claim the other land under the will. Such a course is not inconsistent, and, therefore no election is necessary.

Appeal from Plymouth District Court.—HON. F. R. GAYNOR, Judge.

SATURDAY, APRIL 9, 1898.

ACTION to establish title and for specific performance of an oral contract to convey land alleged to have been made with D. M. Mills in his lifetime. This relief was denied, and, as prayed in her cross-petition, the distributive share ordered set apart to Jane T., the widow of D. M. Mills, intermarried since with Charles McCaustland. Plaintiff appeals.—*Reversed*.

Ira T. Martin for appellant.

I. S. Struble and Dale Hunter for appellees.

LADD, J.—On the twenty-sixth day of April, 1893, D. M. Mills, died testate, owning about 1,000 acres of land in Plymouth county. His will was admitted to probate May 25th of the same year, and under its terms, the north one-half of the southwest one-fourth of section 13, the north one-half of the southeast one-fourth and lots 1 and 2 of section 14, and lot 6 in section 15, all in township 92 north, of range 49 west of fifth principal meridian, being the land in controversy, and certain other property, was devised to this plaintiff. Provisions for Frank P. Mills and the widow were also

made, but the latter concluded to take her distributive share in the estate. Frank P. Mills is the only heir of the deceased, and made no defense to the action. The plaintiff is his stepson, and half-brother to Frank. Charles McCaustland married the widow, Jane T. Mills, and is interested only as her husband. She married Mills in July, 1883, and is a sister of his first wife, who died in March, 1881, leaving three sons, besides Milo and a daughter. This daughter died in 1885, and her sons George in 1890 and David in 1891. Plaintiff bases his claim to this land on an alleged oral agreement with his stepfather, made soon after his mother's death, to the effect that, if plaintiff would continue to live in his family, as he had been doing, for about five years, and work for Mills, and assist in raising the children until they were of sufficient age to look after themselves, he would deed plaintiff the land, erect a house and building thereon, and supply him with a team and farming tools sufficient to work it. He alleges that in pursuance of this contract he worked for the deceased until about the year 1888, performed all required of him, and fully complied with the terms of the contract, and the deceased gave him a team, two cows, erected a dwelling house as he agreed, and gave him possession of the land.

I. The first question to be determined is whether there was an oral contract, as alleged. The evidence shows without controversy that the deceased was much attached to the plaintiff, who had assisted him on his farm and proven faithful to all his interests. He
1 loved him as his own son. Milo was twenty-two years of age at the time of his mother's death, and was under no legal obligation to assist his stepfather in the operation of the farm or in the care of his children. As early as 1878, Mills and his wife stated to several witnesses that the farm in controversy belonged

to Milo, and that it was their intention that he should have it. James Marshall is the only witness who testifies to having heard a conversation between the deceased and plaintiff. While working at the stable, he was called to the house by Mills, and requested to listen to an offer he was about to make. The deceased then said: "I am going to give him that piece of land down there. I am going to break some of it, and give him a team, and put up a house on it. Don't you think he will have a good start?" And stated, further, that he had agreed to give Milo the land if he stayed at home and helped take care of the children. In response to this, Milo said he would stay with the family. The time fixed was until the children were big enough to care for themselves. To Marshall he frequently referred to the land in controversy as Milo's farm. Frank P. Mills testified that the deceased said to David and himself: "Milo is to stay with you boys until you are grown up, and I am going to give him the farm and set him out;" that the farm referred to was that in controversy; that he always spoke of this land as Milo's farm; that he afterwards told Milo to pick out any team he wished, and he would give him two cows, and meant to give him this place and property to stay at home and work until the boys were grown up. After Milo had moved on the premises, the deceased said to Frank he always meant it to be Milo's farm. It was his land, and he had well earned it, and added: "There is plenty left for you boys." To his intimate friend Wheeler, he spoke of Milo with affection, and said: "I am building a house now. He has been a good boy. I am going to let him take his choice of my horses, give him a bunch of cattle, and let him go it for himself, and I will help him in any way that I can." To this witness he always referred to the land as Milo's, and often told him Milo was to stay at home until the little ones had grown up, and that he

was going to give him the land and the property referred to for what he had done and for what he was going to do; that he had earned the property. In a conversation with William L. Joy, his legal adviser for thirty-six years, he stated that Milo had assisted him faithfully in caring for the children, and that he did not know how he could have gotten along without him after the death of his wife, and that he had given him one hundred and sixty acres of prairie land and some timber land. At other times he told him Milo was entitled to it, and that he deserved what he had done for him. To John M. Pinckey he said that he had promised Milo this place of two hundred and more acres; that soon after his mother's death he had agreed with Milo, if he would stay there on the place and do as he had done, he would give him this place and give him teams and machinery to run it, and build him a house. He also told Pinckey he had earned the land and fulfilled the part of his contract, and should have it. The testimony of Moses Smith is to the same effect. This evidence is strongly corroborated by the fact that Mills did everything he had promised except convey the land. He constructed the buildings, gave the team and cattle, and put Milo in possession five years before his death. It will not do in the light of this record, to quibble over the use of words. "Give" was not employed as indicating the disposition of a gratuity, but for the consideration of services rendered by a dutiful son. Neither the deceased nor Milo spoke of the arrangement as a contract or sale, but of what each was to do or had done. That he had promised his dying mother to help care for her children only strengthens the probabilities in his favor, as the deceased would be the more likely to promise to convey the land to induce him to stay in accordance with her wish. It is said Milo did not intend to claim the land under the contract, but to file claim against the

executor for compensation for the eight years he worked for the deceased. Undoubtedly he did not understand what course he must pursue, but in the conversation concerning recovery nothing was said indicating the farm had not been promised in payment. In every instance where it is claimed the plaintiff said he had no contract, it appears reference was had to a written instrument. Mrs. McCaustland testifies that when she was looking over Mills' property, with a view of marrying him, he directed Milo to show her the plantation, and that the latter pointed out this land as belonging to the deceased. The plaintiff denies having done so, and in this he is corroborated by Frank, who is not sure about the matter. While the circumstance is not controlling, we are inclined to think she is mistaken. The boys were more familiar with the premises and would be more likely to remember the route taken. Declarations of Mills that he would deed none of his land during his lifetime are proven by the appellee, but these are explained by other statements to the effect that he could not convey the land to Milo because his wife declined to sign the deed. While Mrs. McCaustland says she never refused to do so, there is no doubt that the deceased so believed, and that this was his only reason for not doing all he had promised.

The only doubtful question in the case is not argued. It seems to be conceded by the parties in argument and in the evidence that the land in controversy is that to which reference is had. It was apart from the other land of the deceased, and he spoke of it as Milo's farm. Tracy and Frank P. Mills point it out quite definitely in their testimony. The construction of the house thereon and the possession taken leaves little doubt of what was intended. But the case was tried on the theory that there was no dispute as to the description, and, as the point is not raised here, we need only remark

that, without indicating the metes and bounds or the government subdivisions, the arrangement seems to have contemplated that involved in this action. We have no doubt the contract was made as alleged.

II The appellant complied with the contract as understood by the parties. What they meant by speaking of the children when grown up or able to look after themselves is difficult to determine. At the time
2 the arrangement was made the youngest child was only four years old, and about eleven when Milo left home. They were then well able to care for themselves in the home provided for them. The deceased had treated the contract as fulfilled, and repeatedly declared Milo had earned the farm and was entitled to it, and that he was only prevented from conveying it to him by the refusal of his wife to join in the deed. The construction given this contract by the parties is binding, and it is sufficient that they were contented with the performance of its conditions.

III. There is some evidence to the effect that appellant elected to take under the will. In this case he may claim this land under the contract, although devised to him, and such other property as may be left
3 him under the terms of that instrument. If this land did not belong to deceased, he could not dispose of it, and, because of this, appellant ought not to be prevented from claiming such as he in fact owned and left to him. There is no inconsistency in such a course. It is only where some inconsistency is involved that an election is necessary. *Hainer v. Legion of Honor*, 78 Iowa, 245; 1 Jarman, Wills, 443; 1 Pomeroy, Equity Jurisdiction, 461; Bigelow, Estoppel, 562. We conclude that a decree should be entered granting the plaintiff the relief prayed.—REVERSED.

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THE AMERICAN EMIGRANT COMPANY V. ISABELLA M.
LONG, Appellant.

Appeal: NOTICE TO ATTORNEY. Service of a notice of appeal upon the attorney who originally appeared for plaintiff and who continued to act in the case for many years and whose appearance as attorney, does not appear, from the record, to ever have been withdrawn is sufficient, under Code, 1873, section 8173, providing that the notice of appeal may be served on the adverse party or his "attorney who appeared for him in the court below," though he had ceased to act as attorney in the case, when served with notice.

STIPULATIONS: *Powers of Attorney.* An agreement of the respective attorneys employed in several suits involving the same issues, entered into after appeals had been taken therefrom, stipulating that the appeals had in fact been taken and perfected, and that all the evidence in each was certified to, and made a part of the record by the trial judge, was binding on the respective parties on appeal.

Appeal from Calhoun District Court.—HON. J. H. MACOMBER, Judge.

SATURDAY, APRIL 9, 1898.

THIS is an action to quiet the title to certain lands in Calhoun county. There was a decree for plaintiff in the court below, and defendants appeal—*Reversed.*

Charles A. Clark & Son for appellants.

H. E. Long for appellee.

WATERMAN, J.—It appears by tacit admission that this is one of a number of actions involving a like federal question. One of these cases (*American Emigrant Co. v. Rogers L. M. Works*, 83 Iowa, 612), was, by writ of error to this court, taken to the supreme court of the

United States, and there disposed of adversely to the claim of the plaintiff herein. See *Rogers L. M. Works v. American Emigrant Co.*, 164 U. S. 559 (17 Sup. Ct. Rep. 188). The other cases were continued from time to time, waiting the decision of the federal tribunal. In accordance with the holding in the last-mentioned case, this at bar must be reversed if a hearing on its merits can be had. But appellee urges certain objections to our consideration of the issues involved, and to these we shall give due attention.

II. This action was originally brought by one J. A. Harvey, as attorney for plaintiff, and he continued to act as counsel in the case for many years. The suit was begun in the year 1877. The record does not
1 disclose that Harvey ever withdrew his appearance as attorney. Notice of appeal was served upon him by defendants, and it is now claimed that he had ceased to act as attorney in this case some months before such notice was served, and therefore the case is not properly in this court.

III. It is also claimed there is no showing that we have all the evidence before us, because the certificate of the judge to the transcript is defective. The notice of appeal, spoken of, was served November 9, 1889. Thereafter counsel for defendants herein, and one J. J. Davis, who it is admitted was at the time one of
2 counsel for plaintiff, entered into the following written stipulation: "American Emigrant Company v. Julius Daniels, et al., and other similar appeals. Appeal from Calhoun District Court. Stipulation. Whereas, appeals have been regularly taken and perfected by the above plaintiff and defendants, or by the plaintiff and defendants respectively, from final judgments and decrees of the district court of Iowa within and for Calhoun county in the following entitled actions, which appeals in each of said

actions are as shown below, namely: The American Emigrant Company v. Isabelle M. Long, et al. (No. 315.) Appeal by defendants; also, appeal by plaintiff. [About fifty other cases are here recited.] Now, with a view to saving expense touching transcripts and records, and to prevent all questions which might arise from loss of original papers, or other casualty, it is hereby stipulated and agreed as follows: (1) That the plaintiff and defendants, respectively, in all of the actions above enumerated, took appeals to the supreme court of Iowa, as above set out and shown, which appeals in each instance were taken by said plaintiff and defendants, respectively, by serving, within six months from the date of the decree, in each instance, on the attorneys of record of the adverse party or parties, and on the clerk of the district court of Calhoun county, a notice, in writing, of appeal to the supreme court of Iowa, in all cases in accordance with law, and by at once filing such notices of appeal in the office of the clerk of said court, and having the same entered on the appearance docket in each case. (2) It is also stipulated and agreed that, in each case in which an appeal or appeals was or were taken as shown above, all of the evidence offered or introduced on the trial of each of such actions in the court below was certified and made of record by the judge before whom such actions were tried in the court below, within six months after the dates of the judgments and decrees, respectively, and, so certified, was filed with the certificates aforesaid in the office of the clerk of said court within six months next after the dates of said judgments and decrees, respectively, and at once entered upon the appearance docket of said court. (3) The defendants shall proceed to prosecute their appeals in the following named cases, or such of them as they may see fit, not less than two, namely: The American Emigrant Company v. Julius Daniels .

et al. (No. 98.) The American Emigrant Company v. Jacob Rogers et al. (No. 116.) The American Emigrant Company v. Helen M. Skidmore. (No. 147.) The American Emigrant Company v. Isaac H. Knox et al. (No. 300.) The American Emigrant Company v. The Iowa Land & Loan Co. et al. (No. 301.) And the plaintiff shall proceed to prosecute its appeals in the following cases, or such of them as they may see fit, namely:

* * * And all other appeals above mentioned, on both sides, shall stand continued, without prejudice to either party, and without being docketed in the supreme court, until the decision of said court in the appeals which may be prosecuted as herein provided. J. J. Davis, attorney for plaintiff in all the cases. Chas. A. Clark, attorney for all the defendants in all the cases." The terms of this stipulation seem to have been observed by all parties until after the death of Davis, which occurred in the year 1897. It is now claimed that Davis had no authority to make any such agreement. The stipulation covers the matters complained of, and we think plaintiff is bound by it. It was within the scope of Davis' authority as an attorney to make an agreement as to the record, and, under the circumstances of this case, we think the stipulation that an appeal had been in fact taken was binding. As indicating the authority of an attorney in relation to the management of an action, we call attention to the following cases: *Ohlquest v. Farwell*, 71 Iowa, 233; *In re Heath's Will*, 83 Iowa, 215; *Lockwood v. Black-Hawk County*, 34 Iowa, 235. As to the objection

3 to the notice of appeal, we wish to say further that this is not a case of attempting to give this court jurisdiction by consent. A notice was in fact served, and served upon one who had appeared in the cause below, and whom the record showed to be still an attorney in the case. The statute provides (section

3178, Code 1873) that notice of appeal may be served, "on the adverse party, his agent or attorney who appeared for him in the court below." We are
 4 inclined to think that the service was sufficient, under the law; but, if not, the agreement made it so,—especially after the parties have acted upon such agreement for many years. We do not know why Harvey's authority as an attorney, though he had withdrawn from the case, could not be recognized by the plaintiff far enough to give him the right to accept service of a notice of appeal, even if the authority went no further, and this we think is what was done. The case will be REVERSED.

THE MINNEAPOLIS & ST. LOUIS R. R. COMPANY, Appel-
 lant, v. THE INCORPORATED TOWN OF BRITT *et al.*

Statutory Dedication. The execution, acknowledgment and record of a plat of land on which certain streets are designated, will not constitute a valid dedication of the land where the plat does not
 1 give the length or breadth of either the lots or blocks and gives the width of only a few of the streets, except that it is stated thereon that it is drawn on a scale of one inch to one hundred and twenty feet and the initial point of the survey cannot be ascertained
 2 without going to another survey which is not in the record, under Code, 1873, section 559, requiring such plat to accurately describe all the subdivisions of the tract and the breadth and courses of all streets and, section 561, providing that such plat when acknowledged and recorded is equivalent to a deed in fee simple of such parts of the land as are set apart for streets.

SAME. An incompetent or defective statutory dedication of land for streets may be sustained as a common law dedication if the streets
 3 marked on the plat can be located with sufficient certainty and if there has been an acceptance by the public.

REVOCATION: Acceptance. An attempted dedication of land for streets by executing, acknowledging and recording a plat of a
 4 tract of land in accordance with Code, 1873, sections 559, 561, which is inoperative under the statute because of defects in the plat may be withdrawn by the donor at any time before acceptance by the public.

Same. An attempted dedication of land for streets by executing, acknowledging and filing a plat of the same as provided by Code, 4 1873, sections 559, 561, which is inoperative because of defects in the plat is revoked by the execution by the grantor, before the acceptance by the public, of a deed including the land designated as streets without any reservation.

LICENSE: Revocation. A railway company which has provided a crossing at a place where its road is crossed by a street attempted 5 to be dedicated to the public and which has dedicated so much of the street as is used for travel cannot exclude the public from the use of the crossing after it has acquiesced in such use for more than fifteen years.

Appeal from Hancock District Court.—HON. P. W. BURR,
Judge.

SATURDAY, APRIL 9, 1898.

SURTIN equity to quiet title to certain land used by the plaintiff as a right of way and depot grounds within what is now the incorporated town of Britt. The town answered, denying the ownership in plaintiff of certain strips of land crossing the said right of way and depot grounds; claiming that these strips were dedicated to and accepted by the town and the public as streets and alleys. The trial court quieted plaintiff's title to certain parts of the land, but, as to other parts of it, held that it constituted a part of the streets and alleys dedicated to the public, and that plaintiff had no interest therein. Both parties appeal. As plaintiff first perfected its appeal, it will be called appellant.—*Modified.*

R. M. Wright and *H. M. Bush* for appellant.

Ripley & Kelly for town of Britt.

DEEMER, C. J.—On the tenth day of January, 1879, John E. Anderson and wife made what purports to be a

plat of certain lands in Hancock county, calling the same "Anderson's Second Addition to the Town of Britt." Thereafter, and on the tenth day of June, 1880, one Lattimore made a plat of lands immediately adjoining the Anderson tract, on the east. On the seventh day of September, 1880, Anderson and wife conveyed, by metes and bounds, and without reservation, a strip of land running from northeast to southwest through his said second addition, to appellant's grantors. This strip crosses what are designated upon the so-called Anderson plat as Hancock, Water, and another unmarked strip of land, called in the record, for the purpose of identification, "X" street, running north and south, and Seventh, Eighth, and Ninth streets running east and west. The Lattimore plat recognizes and dedicates the ground occupied by the appellant for its right of way and depot grounds, and no controversy exists as to any part of the land covered thereby, save a small portion in what is called "X" street. This action is to quiet plaintiff's title to the so-called streets and alleys covered by the Anderson plat, which cross its right of way and depot grounds. The trial court quieted plaintiff's title in so far as it relates to Seventh street, and that part of the unnamed street between Water street and Grant street, where the same crosses the right of way, except that the crossing, as now used by the public, across said right of way along and across Eighth street, and from the southwest corner of the depot platform, be kept open by the plaintiff, as it is now traveled and used. It further decreed that the other streets in controversy, to-wit, Hancock street, Water street, Eighth street, and Ninth street, are public highways, with the right of the public to pass across and over plaintiff's right of way and depot grounds where said streets

cross the same. From what we have said, it is apparent that if the plat made by Anderson and wife
2 operated, in itself, or by reason of the acceptance of any dedication of lands therein to the public, as a transfer of the title to such lands, then appellant is not entitled to the relief prayed, unless by reason of estoppel or adverse possession. The first question which arises, then, is, was there a sufficient dedication of these so-called streets to the public? Appellant argues that there was not a sufficient statutory dedication, and that the claim of common-law dedication is not sustained, because no evidence of acceptance is shown. The statutory requirements with reference to plats are as follows: Section 559, Code 1873: "The * * * owner * * * of any tract or parcel of land * * * who shall hereafter subdivide the same * * * shall cause a plat of such subdivision, with references to known or permanent monuments, to be made, which shall accurately describe all the subdivisions of such tract or parcel of land, numbering the same by progressive numbers and giving the dimensions and length and breadth thereof, and the breadth and courses of all streets and alleys established therein." Section 560 of the same Code provides for the signing, acknowledging, and recording of such plats; and section 561 says, in substance, that the acknowledgment and recording of such a plat is equivalent to a deed in fee simple of such portions of the premises platted as are set apart for streets or other public use. The Anderson plat names the streets, and numbers the lots and blocks. The surveyor who made the plat also certifies that the subdivision is situated upon a certain forty acres of land; that the streets are laid out at right angles, running eleven degrees, thirty minutes north; that the initial point of the survey is the

center of a street at the southwest corner of a forty acres immediately adjoining the platted tract upon the north, which was surveyed and subdivided at a prior date; and that the plat is drawn on a scale of one inch to one hundred and twenty feet. In his statement, Anderson says that the plat is a subdivision of parts of the forty acres covered thereby, and that he platted the same, and dedicated the streets and alleys, as shown on said plat. There is no reference to known and permanent monuments, except as stated; nor does the plat give the length or breadth of either the lots or blocks. The width of Hancock and Water streets is given as sixty-six feet, but the width of Seventh, Eighth, Ninth, and the so-called X street, is not given. There is no description of the subdivisions of the tract, except as stated. The initial point of the survey cannot be ascertained without going to another survey, said to have been made in 1878, but which is not in the record, and which is not referred to, except as stated. A substantial compliance with the provisions of the statute before quoted is all that is required, yet so many defects are apparent in this plat and survey that we do not think it has the effect to vest in the public a fee-simple title to what appears to be intended as streets. The only means of knowing the breadth of most of the streets in controversy, and, indeed, the only way in which to determine the exact location or size of any lot or block or alley, is by reference to the scale, which says that the plat is drawn on the basis of one inch to one hundred and twenty feet. Such a reference is too indefinite to constitute the basis for a conveyance of land. The variation of one-twelfth of an inch means a difference of ten feet in the dimensions of a lot or the breadth of a street. Surely this is not a substantial compliance with the statute. *Village of Winnetka v. Prouty*, 107 Ill. 218; *Elliott, Roads & S.* p. 85. The case of *Taraldson v.*

Town of Lime Springs, 92 Iowa, 187, upon which appellee relies, is not in point, for the reason that the dimensions of the various subdivisions of the plat, and the breadth of the streets and alleys, were all accurately given. As there was no statutory dedication, we look to see if there were such acts and conduct on the part of Anderson and the public as to amount to a dedication at common law. An incompetent or defective statutory dedication may be sustained as a common-law dedication if the streets and alleys marked on the defective plat can be located with sufficient certainty; and acceptance by the public is shown. But such a dedication, even if made with requisite accuracy, may be withdrawn by the donor at any time before acceptance by the public. Acceptance is essential to the establishment of such a street, although perhaps not necessary to a statutory dedication,—a point, however, that we do not decide. But see *Brown v. Taber*, 103 Iowa, 1. The deed to appellant's grantors amounted to a revocation of the attempted dedication, and will prevail, unless it be shown that the public accepted the dedication before the deed was made. As said in the case of *Incorporated Town of Cambridge v. Cook*, 97 Iowa, 599, "There must be an acceptance of a dedication of lands for public purposes, and, while slight evidence is sufficient, yet, some showing is quite as essential as evidence of the dedication itself." That Anderson intended, when he made the plat, to dedicate some of his lands designated as streets, to the public, is plain, but the exact location of such land cannot be ascertained from the plat itself.

Extrinsic evidence is necessary to definite identification. Assuming that there is sufficient evidence of use and travel by the public to locate the so-called streets, on either side of plaintiff's depot

grounds and right of way, yet there is no evidence whatever of any use of these streets, either across appellant's land, or at any other place, before the delivery of the deed to appellant's grantor. As no acceptance of the dedication before the making of this deed is shown, it follows that there was a revocation of so much of the plat designating the streets as is covered by the deed, and that appellant is entitled to a decree quieting its title to all of the land, except it be to that part reserved to the public in what is known as "X" and Seventh streets. It appears from the evidence that the part of these streets so reserved has been used by the public, with the knowledge and acquiescence of the railway company, for more than fifteen years. The railway company has provided a crossing at this place, and has evidently dedicated so much of it as has been and is now used for travel. Appellant does not seriously contend that this part of the decree is wrong. In any event, it is not justified in excluding the public from the use of this crossing. See *Sarver v. Railroad Co.*, 104 Iowa, 59. The district court was in error in denying appellant relief as to Hancock, Water, Eighth, and Ninth streets, and its decree in that respect will be reversed.

The town appeals from the decree denying it relief as to the whole of Seventh and X streets. It will be observed from what has already been said that it is not entitled to a more favorable decree than was rendered, and as to it the decree will be affirmed. On plaintiff's appeal, **MODIFIED AND AFFIRMED.** On defendant's appeal, **AFFIRMED.**

PATRICK CONLEY, Appellant, v. THOMAS DUGAN.

Action: LIMITATION OF ACTIONS. A plaintiff in an action on a note, who negligently delays mailing the petition to the clerk for filing
2 so long, that from a slight interruption in the mail service, the petition is not filed until two days after the date fixed in the original notice, as a result of which, under Code, 1873, section 2600, the action is dismissed on defendant's motion, cannot commence a second action to prevent the bar of the statute of limitations, under section 2537, authorizing the bringing of a new suit with such effect if plaintiff fails in his first action through any cause
"except negligence in its prosecution."

SAME. Defendant in an action on a note, is entitled, under Code, 1873, section 2600, to a dismissal of the action where the original notice served in the action fixed the date for filing the petition and
2 plaintiff waited so long before mailing the petition to the clerk that from a slight interruption of the mail service the petition did not reach the clerk until two days after the time fixed for filing.

SAME. One who neglects to file his petition in time, by reason of which his action is dismissed, on defendant's motion, after it is
3 too late, on account of the statute of limitations, to commence a new action, is not entitled to a continuation of his action, under Code, 1873, section 2537, providing that, if plaintiff fail in his action through any cause except negligence in its prosecution, a new suit, if brought within six months, shall be deemed a continuation of the first; though an attorney, not shown to have any authority to act for defendant, but representing that he was employed to defend the action, negotiated for settlement, and procured extension of time to answer, thereby consuming time, till a new action was barred.

Appeal: REVIEW. The action of the trial court in dismissing an action on a note, from which no appeal is taken, cannot be considered on appeal from a judgment sustaining a demurrer to
1 the petition in a second suit on the same cause of action, which second suit is claimed to be a continuation of the first, within section 2537 of the Code of 1873.

Appeal from Howard District Court.—HON. A. N. HOBSON, Judge.

SATURDAY, APRIL 9, 1898.

PLAINTIFF sued to recover upon a promissory note which fell due July 24, 1896. The original notice served on the defendant April 23, 1896, stated that the petition would be on file on June 1, 1896. The petition was not in fact filed until June 3d. On October 13th following, defendant moved to dismiss the action because the petition was not on file at the time stated in the notice. This motion was sustained, and to the ruling plaintiff excepted, but no appeal was taken therefrom. On December 2, 1896, plaintiff brought another action on said note, alleging as follows: "That this action was originally commenced on April 22, 1896, by delivering an original notice to the constable, with instructions to serve immediately, and the said notice was served on the following day. That said notice stated that the petition would be on file on or about June 1, 1896. That said petition was filed on June 3, 1896. That at the June term, commencing June 15, 1896, at which defendant was cited to appear, defendant was negotiating with H. L. Spaulding, plaintiff's attorney for a settlement. That H. T. Reed informed said attorney that he was employed to defend said action, and that he had a verified answer in his possession, but, before filing said answer, he intended to file a motion for security for costs. That thereupon it was agreed between said attorneys that, owing to the expected settlement, plaintiff would waive the filing of any pleadings at said term, by defendant. That, should no settlement be reached, plaintiff would file a bond as security for costs, without a motion being filed therefor, and defendant would then file his answer a sufficient time before the October term next following, so that plaintiff could take depositions and be prepared for trial at said term, and that the cause be continued. That in accordance with said

agreement, and in reliance thereon, said cause was continued, and, no settlement having been reached, plaintiff filed his bond as security for costs. That defendant did not file his answer, and at the October term filed his motion to dismiss, because the petition was not filed on or before the date stated in the original notice, which motion was sustained. That said petition was drawn by plaintiff's said attorney, and was mailed by him at Elma, Iowa, the home of said attorney, in time to reach the clerk's office, in the usual course of the mails, on the date stated in the notice, and the same was delayed in the mails. That plaintiff was not aware of the date of filing until defendant's said motion was filed. Wherefore plaintiff prays that this action be held a continuance of the action commenced April 22, 1896, and that the cause of action be held not barred, and that he have judgment against the defendant for the amount due on said note, according to the terms thereof, and for costs of suit." To this petition a demurrer was interposed, setting up the following grounds: (1) That the petition shows upon its face that the cause of action stated therein is barred by limitation; (2) that the showing made is not sufficient to prevent the running of the statute. The demurrer was sustained, and, plaintiff electing to stand upon the ruling, judgment was entered for defendant for costs. To this, plaintiff duly excepted, and, by proper process, brings the matter to this court for review.—*Affirmed.*

H. L. Spaulding for appellant.

Reed & Reed for appellee.

WATERMAN, J.—Appellant assigns as error, first, the action of the trial court in sustaining the motion to dismiss the first action. No appeal being taken from

the ruling, we cannot consider the matter. Indeed, we think the beginning of the second suit was
1 a waiver of any right to complain of rulings in the first action. But, while we must accept the decision on the motion as final, there are some matters incidental to the first action which are rendered necessary and proper for consideration here, by reason of the allegations of the petition in the second suit.

II. The next two assignments of error are based upon the rulings on demurrer, and they may very well be considered together. The original notice was served in the first action April 23d, fixing the time when the
petition would be on file as June 1st. Plaintiff
2 then waited until so late a date that any slight interruption of the mail service would prevent him from complying with the terms of the notice, and sent the paper by mail to the clerk. Such interruption occurred, and the petition was not filed until after the date fixed in the notice. This default entitled defendant to have the action dismissed. Code 1873, section 2600; *Webster v. Hunter*, 50 Iowa, 215. That this was negligence on defendant's part, we think, is substantially settled by *Clark v. Stevens*, 55 Iowa, 361.

Plaintiff seeks to bring this action within the terms of Code 1873, section 2537, which provides, in substance, that, if plaintiff fail in his action through any cause except negligence in its prosecution, a new suit, if brought within six months, shall be deemed a continuation of the first. But can what took place after the
3 filing of the first petition in any way excuse plaintiff, or operate to shield him from the consequences of his default? It is not alleged in the petition in this action that Reed was Dugan's attorney in June, or had any authority to act or speak for him. If it can be said that plaintiff was not negligent in relying upon a statement made by a sworn officer of the court, while this

might excuse his delay, it would not exonerate him from the charge of negligence in beginning the action; and it was for the latter, and not for delay, that his action was finally dismissed. If, by any wrongful act of Reed, plaintiff was induced to wait until the dismissal of his action lost him his rights, it may be that he has a cause of action for this against Reed; but he cannot excuse his own default by the plea that some person took advantage of it. The judgment of the trial court is **AFFIRMED.**

W. W. SLOCUM, Appellant, v. C. R. BROWN et al.

Sales: EQUITABLE LIENS: Innocent purchaser. A purchaser of real estate is not bound by an oral agreement between the seller and a third party creating an equitable lien on the property, unless his knowledge of the agreement is shown.

Depositions in Shorthand. Code, 1878, section 3785, providing that when depositions are taken in shorthand the writer shall be duly sworn to take the same correctly, and to make correct extension thereof into longhand, and that the notes shall be signed by the witness after being read over to him, and be filed with the extension, does not require that the translation of the notes be signed or sworn to by the witness; nor is any agreement essential to the taking, if no objection is made to taking them in shorthand.

SUPPRESSION. That the attorney for plaintiff was unable to reach the place where depositions were taken, by rail, at the time fixed for the taking, after the time he started, is not a ground for excluding the depositions, where he might have reached the place in time by starting earlier or by a private conveyance.

CROSS-EXAMINATION. Witnesses whose depositions have been taken will not be required to appear on the trial for cross-examination because the attorney for the opposite party was not present at the time the depositions were taken, where there was not sufficient excuse for his failure to be present.

Trial: ASSIGNMENT OF CAUSES. The trial court is not required to assign the different causes for trial on particular days under a rule of court providing that on the first day of the term or as soon thereafter as practicable, the court "may" make an assignment of the trial causes which shall fix the day of the term on which each cause shall be tried, and the court has a discretion in the matter which will not be interfered with unless abuse of it is shown.

Appeal from Fayette District Court.—HON. L. E. FELLOWS, Judge.

SATURDAY, APRIL 9, 1898.

ACTION in equity to recover an amount alleged to be due on a promissory note, and to have established and foreclosed an equitable mortgage on land. There was a hearing on the merits, which resulted in the dismissing of the plaintiff's petition, and the plaintiff appeals.—*Affirmed.*

H. E. Long for appellant.

G. H. Phillips, Ainsworth & Ainsworth and Wm. E. Fuller for appellees.

ROBINSON, J.—The promissory note upon which plaintiff's demand for relief is based was given to the plaintiff by one John Thorman on the first day of January, 1894. At that time Thorman was the owner of several hundred acres of land in Fayette county, and agreed orally to give a mortgage upon that land to secure the note, but failed to do so. On the first day of March, 1894, he conveyed the land by warranty deed to C. R. Brown. This action was commenced in August of the same year to recover the amount due on the note, and to enforce the verbal agreement of Thorman as an equitable mortgage of the land. Thorman and Brown were made parties defendant and filed separate answers. The cause was afterwards dismissed as against Thorman, and he then filed a petition of intervention. Brown denies that he had any knowledge of an agreement to mortgage the land when he purchased it, and denies that such an agreement was made. Thorman bases his right to intervene upon the covenants of his deed to

Brown, and alleges that the larger part of the note in suit was given for usurious interest.

I. The appellant has filed an assignment of errors, and we will first notice questions which they present. The defendant and the intervener served upon the plaintiff notice that their depositions would be taken at West Union on the eleventh day of May, 1896, at nine

o'clock in the forenoon. In response to that
1 notice, Mr. Long, the attorney for the plaintiff, left Des Moines, his place of residence, on the tenth day of May, and arrived at Oelwein during the following night. He then found that the first train for West Union did not leave Oelwein until about eleven o'clock, and at nine o'clock he had communication by telephone with L. L. Ainsworth, one of the attorneys for the defense, and, after stating that he would be in West Union at noon, to be present at the taking of the depositions, for the purpose of cross-examination, he requested that the proceedings to take them be delayed until that time. Mr. Ainsworth refused to wait, and stated that he should at once proceed to take the testimony of the witnesses, and that was done. When Mr. Long reached West Union at noon, the depositions had been taken and the witnesses had returned to their homes. The depositions were taken in shorthand, and the shorthand notes only were signed by the witnesses, but a translation of the notes was made, and used as their testimony. In due time the plaintiff moved to suppress the depositions on the ground that they were not signed by the witnesses, and no agreement had been made to take the depositions in shorthand, nor to translate the shorthand notes. The motion also asked that, in case the depositions were not suppressed, the witnesses should be required to appear in court for cross-examination. The motion was overruled. Section 3735 of the Code of 1873 refers to the taking of depositions, and, as amended

by chapter 94 of the Acts of the Twenty-fifth General Assembly, contains the following: "The person before whom any of the depositions above contemplated are taken, must cause the interrogatories propounded, whether written or oral, to be written out, and the answers thereto to be inserted immediately underneath the respective questions. * * * The whole being read over by or to the witness must be by him subscribed and sworn to in the usual manner. Provided that when the examination is taken in shorthand, the writer shall be duly sworn to take the same correctly and truly, and to make correct extension thereof into longhand, typewriting or print, and the extension so made and duly certified by the person before whom the depositions are taken shall be received as the depositions. When depositions are taken in shorthand the notes shall be signed by the witnesses after being read over to them, and shall be filed with the extension."

The requirements of this statute appear to have been fully met. It did not require that the translation

2 should be signed and sworn to by the witnesses, but it was sufficient if the notes were signed and sworn to by the witnesses. Nor was any agreement essential to the taking of the depositions in shorthand. No objection to that method of taking them was made at the time they were taken, and, if they were properly taken, the objection could not have been made afterwards. The appellant failed to show a sufficient excuse for his failure to be represented at the taking of the depositions.

It is shown that his attorney could not have
3 reached West Union by train earlier than he did after starting, but no reason for his failure to start earlier, or to go from Oelwein by private conveyance, is shown; nor does it appear that the plaintiff was prejudiced by his failure to cross-examine the witnesses; nor was there any sufficient reason for the court

to order the witnesses to appear for cross-examination. The motion was not well founded, and was properly overruled. *Scharfenburg v. Bishop*, 35 Iowa, 60. The case of *Baldwin v. Railway Co.*, 68 Iowa, 37, cited by appellant, did not involve the taking of depositions under the statute we have considered, and is not in point.

II. The plaintiff asked the court by letter to fix a day for trial of the cause, but the request was refused. It is made to appear that it was not the practice of the court to assign a cause for a day specified except upon the application of the parties made in court, and with the consent of all the members of the bar. The cause was called for trial when it was reached in its
4 regular order. The appellant contends that it was the duty of the court, under rule 3 of the rules adopted by the convention of district judges held January 5, 1887, to make an assignment of the cause. The rule designated provides that: "On the first day of the term, or as soon thereafter as practicable, the court may make an assignment of the trial causes, which assignment shall fix the day of the term on which each cause shall be tried, and parties will be required to conform to this order of trial. Further assignments may be made by the court as often as the progress of the business of the term shall render the same necessary." This does not require the court to make assignments, and whether it will do so or not is within its discretion, to be exercised with reference to the business before the court, the time which may be given to the business, and the convenience of all persons interested in the court proceedings. There is no showing of an abuse of discretion, and the court did not err in refusing to fix the date for the trial of the cause before it was reached in its order.

III. There is little or no conflict in the evidence with respect to the knowledge of the agreement of Thorman to give a mortgage, which Brown had when he purchased the land in controversy. The defendant Brown was a purchaser for value. He states positively that he did not have any knowledge of the alleged oral agreement to mortgage the land he purchased, and there is no direct evidence that he had such knowledge or any information which should have caused him to inquire for such an agreement. Thorman states that he did not inform Brown of the agreement when the sale to him was made, and that after the note of January 1, 1894, was given, and the agreement was made, and before the sale to Brown, the note was surrendered, and a new one given for it, and that nothing was then said about giving a mortgage. There is evidence which tends strongly to show that Thorman had stated to different persons that Brown knew of the agreement when he purchased the land, but there is nothing which overcomes the positive testimony of Brown that he did not have such knowledge, and the statements to the same effect made by Thorman as a witness. Witnesses testified to conversations with Brown respecting the agreement, but none of them show that he knew, or had any reason to know, of it before he purchased the land.

The conclusion we reach as to the merits of the case renders it unnecessary to consider numerous questions presented in argument, as their determination could not affect the disposition of the case we find it necessary to make. The record does not show any error prejudicial to the appellant. The decree of the district court is fully sustained by the evidence, and it is **AFFIRMED**.

PATRICK MAGUIRE v. J. W. HANSON, Sheriff, *et al.*,
Appellants.

Homesteads: ABANDONMENT: Pleading. Plaintiff, occupying a dwelling house with his wife, which they had moved from their homestead to their son's land sixteen months previously, sued to enjoin a sale of their land under execution, and alleged that they moved because they needed their son's care, "by reason of their age, sickness and infirmities," and that the removal was temporary and without any intent to permanently separate the house from the land, or of abandoning their homestead or homestead rights. *Held*, that the petition was insufficient, as it failed to show a definite purpose to resume their residence on the land.

SAME. It is not sufficient that a homestead claimant is supported by cultivation and use of the property claimed as a homestead. The actual occupation of the premises as a home for the owner and his family is required, except in a few exceptional cases of temporary absence.

SAME. A removal of the dwelling house from a homestead for a temporary cause, with the intention on the part of the owner to replace it on the land and resume his residence therein, does not prevent an abandonment of his homestead right in the land, where he subsequently abandons such original intention.

SAME. The fact that the dwelling house, after removal from land previously used as a homestead, remains exempt as a homestead does not continue the homestead character of the land from which it has been removed.

Evidence. The removal of a dwelling house from land and its occupation as a home in its new location are *prima facie* evidence of abandonment and plaintiff who asserts homestead rights, must rebut this presumption which arises from these facts.

Appeal from Palo Alto District Court.—HON. W. B. QUARTON, Judge.

SATURDAY, APRIL 9, 1898.

ACTION in equity to restrain the sale under execution of land alleged to be a homestead. A demurrer to

the petition was overruled, and, the defendants having refused to plead further, a decree was rendered in favor of the plaintiff. The defendants appeal.—*Reversed.*

T. F. McCue for appellants.

Soper, Allen & Morling for appellee.

ROBINSON, J.—The facts alleged in the petition, and admitted by the demurrer, are as follows: In April, 1873, a judgment was rendered by the district court of Allamakee county against the plaintiff, and in favor of the defendant C. H. McCormick & Bro., which is unpaid. At the time the indebtedness on account of which the judgment was rendered was contracted, the plaintiff owned six hundred and forty acres of land in Allamakee county, upon which his dwelling house was situated. He afterwards disposed of that land, and, with the proceeds thereof, purchased two hundred acres of land in the same county, and occupied a part thereof as his homestead. It is alleged that the price of that property was paid from the proceeds of his former homestead. In

1 the year 1885 he disposed of the second homestead, and, with the price received, purchased an eighty-acre tract of land in Palo Alto county, and erected upon one-half of it a dwelling house, which he and his wife thereafter occupied as a homestead for a period of nearly ten years. In October, 1894, the dwelling house was moved onto land owned by a son of the plaintiff. The reason for the removal of the house was that the plaintiff and his wife, "by reason of their age, sickness, and infirmities," required the care and assistance of their son; but it is alleged that the "removal was only temporary, and for the purposes aforesaid, and not with any intention of permanently separating the said house from the said land, and with no intention

whatever of abandoning their said homestead rights in said property, but that they still use, and are supported from the proceeds of the use and cultivation of, the said homestead forty acres." The defendant Hanson, as sheriff, levied an execution, issued by virtue of the judgment described, on the forty acres of land from which the dwelling house was removed, advertised it for sale on the eighth day of February, 1896, and, unless restrained, will sell it to satisfy the judgment. The decree of the district court enjoined the defendants from seeking to enforce the judgment against the land described.

That the land was a homestead, and not subject to sale to satisfy the judgment specified prior to the removal of the dwelling house therefrom, is not disputed, and the only question we are required to determine is stated by the appellants as follows: "Did the forty acres in controversy constitute the homestead of

the appellee at the time of the levy?" To constitute a homestead under the law of this state, it is not sufficient that the homestead claimant is supported by the cultivation and use of the property claimed as a homestead. The actual occupation of the premises as a home for the owner and his family is required, excepting in a few cases, where a temporary absence from the home for authorized purposes will not affect its homestead character. *Davis v. Kelley*, 14 Iowa, 523; *Windle v. Brandt*, 55 Iowa, 221. "The homestead must embrace the house used as a home by the owner thereof, and if he has two or more houses thus used by him at different times and places, he may select which he will retain as his homestead." Code 1873, section 1994. A person may sell his homestead, and invest the proceeds in another which will be exempt from existing debts, and should be allowed a reasonable time in which to make the change; but a mere intent to erect

upon a lot or tract of land a house to be occupied as a home at some indefinite time is not sufficient to constitute a homestead, within the meaning of the statute. *Givans v. Dewey*, 47 Iowa, 414; *Christy v. Dyer*, 14 Iowa, 438; *Bank v. Hollingsworth*, 78 Iowa, 575; *Mann v. Corrington*, 93 Iowa, 108, and cases therein cited.

But we are required to consider in this case more particularly what constitutes an abandonment of a homestead. It is, of course, true that an actual removal from a homestead, with no intention to return to it, will operate as an abandonment. *Fyffe v. Beers*, 18 Iowa, 4; *Newman v. Franklin*, 69 Iowa, 244. And a removal with an intention not to return except upon a contingency which the person removing intends to avoid will constitute an abandonment. *Kimball v. Wilson*, 59 Iowa, 638. The same is true of a removal made without any definite and fixed purpose to return. *Cotton v. Hamil*, 58 Iowa, 594; *Perry v. Dillrance*, 86 Iowa, 424; *Blackburn v. Traffic Co.*, 90 Wis. 362, (63 N. W. Rep. 289); *Jarvis v. Moe*, 38 Wis. 440. But when a person removes from this homestead for a temporary cause, with the definite and settled purpose of returning to it, and that purpose is continuously held in good faith, there is no abandonment of the homestead right. The length of time he is absent from his homestead, although not necessarily conclusive, may be considered as tending to show his intent. *Dunton v. Woodbury*, 24 Iowa, 74. An absence from the homestead of several years, during which time it is rented to another does not necessarily operate as an abandonment of the homestead right. *Boot v. Brewster*, 75 Iowa, 631; *Zwick v. Johns*, 89 Iowa, 550; *Repenn v. Davis*, 72 Iowa, 548; *Ayers v. Grill*, 85 Iowa, 720; *Robinson v. Charleton*, 104 Iowa, 396; Waples Homestead, section 563. The homestead right, when once acquired, will be presumed to continue until it is shown to have been terminated.

Boot v. Brewster, supra; Robinson v. Charleton, supra; And the burden of showing that it is at an end is upon the party who assails it. In this case it appears that the land in controversy was a homestead until less than sixteen months before this action was commenced; but the removal by the plaintiff of his dwelling house from the land, and his occupation of it in its new location as a home, are *prima facie* evidence of abandonment, and the burden is on him to rebut the presumption which arises from those facts. *Newman v. Franklin*, 69 Iowa, 244; *Waples Homestead*, section 564. It is said that he has failed to meet that requirement, in that his petition does not explicitly allege an absolute and unqualified intention to return to and reoccupy as a homestead the land in controversy. The petition alleges that the removal was only temporary, and not with any intention of separating permanently the house from the land, and with no intention whatever of abandoning the homestead or the homestead rights. All this may be true, and yet the plaintiff may not now have any intention of replacing his house on the land, and there occupying it as a home for himself and his wife. The intent with which the house was removed is not controlling. If the plaintiff, when he removed it, did so for a temporary cause, and intended to replace it on the land, and resume his residence therein, but afterwards abandoned that intention, and now does not purpose to again make it his place of residence, his original intention has ceased to be effective, and there is an abandonment of the homestead right in the land. The plaintiff removed his house from the land because of the age, infirmities, and sickness of himself and his wife, for the purpose of having the care and assistance of their son. The sickness may be

temporary, but their increasing age and the infirmities incident thereto might well make the care and assistance of the son as necessary in the future as in the past. However that may be, it is clear, we think, that the petition fails to show that definite and fixed purpose on the part of the plaintiff to resume his residence on the land in controversy which is necessary to prevent his removal and absence therefrom, under the circumstances stated, having the effect of an abandonment.

It is claimed by the appellee that his dwelling house is exempt as a homestead, although he does not own the land upon which it is now situated. That may be true, but the defendants are not seeking to
 7 sell the house; and, if it be true that it is a homestead, that fact alone does not continue the homestead character of the land. To have that effect, the house should be on the land. Section 1995 of the Code of 1873 provided that a homestead might contain one or more lots or tracts of land if they were contiguous; but the petition does not make a case within the provisions of that section, and the case of *Reynolds v. Hull*, 36 Iowa, 394, does not support the claim which we understand the plaintiff to make, that the house, although separated from the land, may be regarded as so much a part of it as to continue the homestead character which once attached to it. We conclude that the demurrer should have been sustained, and the decree of the district court is therefore REVERSED.

REID, MURDOCK & COMPANY V. CHARLES W. BRADLEY AND
 THE HASTINGS-BRADLEY COMPANY, Appellant.

Reformation; NEGLIGENCE AS BAR. Where one signs a contract of guaranty, intending thereby to guarantee payment of purchases of merchandise or advances thereafter made, and the contract

106	220
107	406
105	220
135	604

guaranteed all indebtedness which might then or thereafter exist or be owing, which fact he might have discovered by a careful reading of the instrument, he will be held to his contract, in the absence of fraud, as his negligence will bar him relief in equity; and this, though one party to the contract directed the other where to make erasures of clauses covering antecedent debts and said that the erasure under such direction struck out all such clauses, while, as a matter of fact, it took out but one such clause and left others in the writing.

Appeal from Lyon District Court.—HON. SCOTT M. LADD,
Judge.

SATURDAY, APRIL 9, 1898.

ACTION upon a contract of guaranty. Defendant Bradley admitted the execution of an instrument of guaranty to plaintiff, but claims a mistake therein in so far as it related to any pre-existing indebtedness of the principal, and further says that the contract was obtained through fraud and misrepresentation as to its contents. He prayed for a reformation of the instrument and a dismissal of the petition. The case was transferred to the equity side of the calendar, and tried to the court, resulting in a judgment for plaintiff. Defendant Bradley appeals.—*Affirmed.*

E. C. Roach and McMillan & Dunlap for appellant.

No appearance for appellee.

DEEMER, C. J.—On and prior to August 23, 1893, the Hastings-Bradley Company, a corporation, was indebted to appellee for goods and merchandise sold and delivered in the sum of four hundred and ninety-three dollars. On that day appellant, Bradley, entered into a written contract of guaranty with appellee, the material parts of which are as follows: "For
1 value received, and in consideration of the forbearance in collection and extensions of time
upon the [purchase of merchandise or advances of

money heretofore made to, or] purchases or advances of money which may hereafter be made by or advanced to Hastings & Bradley Company, of Rock Rapids, Iowa, and for other good and valuable consideration, I hereby guaranty the payment of any indebtedness owing to Reid, Murdock & Company by the said Hastings & Bradley Company, of Rock Rapids, Iowa, to the amount of all purchases, together with interest on all the above-described indebtedness at the rate of eight per cent. per annum. And I hereby further guaranty prompt payment at maturity of any notes which may be given in settlement of such purchases or advances, with interest at eight per cent., waiving my right to any notice of extensions of time, or the fact that such notes may be given; also waiving notice of the acceptance of the within guaranty, meaning and intending hereby, for and by the consideration above mentioned, to unqualifiedly guaranty any and all indebtedness which may now or hereafter exist, or be owing to Reid, Murdock & Company by the Hastings & Bradley Company, of Rock Rapids, Iowa." Before signing the contract Bradley struck out the words inclosed in brackets, and his contention is that in so doing he intended to absolve himself from liability for all pre-existing indebtedness; that it was the understanding and agreement that the guaranty should relate to future transactions, and that, in so far as it appears to cover past or present indebtedness of the corporation, it is of no validity, because entered into through mistake, and by reason of the fraud of appellee. A careful reading of the evidence satisfies us that Bradley did not intend to guaranty the past indebtedness of the corporation. The facts appear to be that prior to August, 1893, Bradley was a stockholder in the corporation. During that year it became involved, and was unable to promptly meet its

indebtedness. On the eighteenth day of August, Hastings, who had theretofore been president of the corporation, retired, and Bradley was elected in his place. Bradley also became the general manager of the concern. Shortly after this change, appellee's credit man appeared upon the scene for the purpose of securing or collecting the indebtedness then owing by the corporation. By reason of his selection as manager, Bradley was interested in securing a line of credit for his corporation. Such was the attitude of the parties when they met. The credit man insisted upon a guaranty covering past indebtedness. This Bradley absolutely refused to give; being guided to this conclusion through the advice of his attorney. He was willing to become bound for all future indebtedness, but did not wish to assume personal responsibility for past debts. Thus matters stood for a day or two, when Bradley agreed that he would sign a guaranty covering future indebtedness, and indorse to appellee a note held by the corporation upon one Church as collateral to the past indebtedness. It was also agreed that appellee should leave its accounts against the corporation with a bank to which it (the corporation) was indebted, with the understanding that, if any mortgages were executed to the bank, another should at the same time be executed to appellee, which should be second in point of time, only, to the bank mortgage. Attempting to execute this agreement, Bradley signed the contract

2 of guaranty heretofore set out,—which was partly in print and partly in writing,—after having erased the words to which we have referred. The credit man's attention was called to the erasure, and there is no doubt in our minds that Bradley thought he had so changed the contract as that it applied to future indebtedness only. It is likely that the credit man directed Bradley to the place where the erasures should

be made, but of this there is some doubt. This much does appear, however: that Bradley was able to read and write, and had full opportunity before signing to read the document. There is no evidence of any fraud save a statement of the credit man that the line scratched out was the only one relating to past purchases. Appellant says that the mistake in the signing of the contract was due to oversight in not reading it over more closely, and gives as his only excuse for not doing so—*First*, the statement of the credit man; *second*, that “he [the credit man] kept nagging the life out of me, and it was dark in the room, and he pointed to the paper, and said, ‘Scratch out that line there, being as to past purchases,’ and I scratched it out and signed it.” There is no doubt that appellant is entitled to reformation or rescission of the contract, unless it be that his negligence was such as to bar him of relief. It is a general rule that negligence is an insuperable objection to relief in equity, on the ground of mistake. In the case of *Glenn v. Statler*, 42 Iowa, 107, we quoted with approval the rule announced by Judge Story in his work on Equitable Jurisprudence (section 146) as follows: “It is not, however, sufficient in all cases, to give the party relief, that the fact be material; but it must be such that he could not by reasonable diligence get knowledge of, when he was put upon inquiry. For if, by such reasonable diligence, he could have obtained knowledge of the fact, equity will not relieve him, since that would be to encourage culpable negligence.” Again, in the case of *McCormack v. Molburg*, 43 Iowa, 561, it is said: “If the means of knowledge of the alleged fraud were equally open to both parties, the law will not interfere to protect the negligent; * * * and, if no device is used to put him off his guard, a party who, having capacity to read an instrument, signs it without reading, places himself beyond legal relief. If

the truth or falsehood of the representation might have been tested by ordinary vigilance and attention, it is the party's own folly if he neglect to do so; and he is remediless." Applying these rules to the facts of the case, this court further said: "The defendant does not state that plaintiff used any artifice to prevent him from reading the contract, nor does he state that he was unacquainted with the English language, or that he couldn't read. In fact, no excuse whatever is given, except that he signed the contract relying on the representation of plaintiff as to its contents. This is inexcusable neglect, and the defendant must suffer the consequences of his own folly. The effect of such a rule as that claimed by appellant would be to render written contracts of but little practical value over those existing in parol only." This language is peculiarly applicable to the case before us. See, also, *McKinney v. Herrick*, 66 Iowa, 414; *Wallace v. Railway Co.*, 67 Iowa, 547; *Gulliher v. Railroad Co.*, 59 Iowa, 416; *Roundy v. Kent*, 75 Iowa, 662; *Railway Co. v. Cox*, 76 Iowa, 306; *Jenkins v. Coal Co.*, 82 Iowa, 618. These cases, and others which might be cited, are conclusive of the question of appellant's negligence, and clearly show that he is not entitled to the relief prayed in his cross-bill. The decree of the district court is right, and it is **AFFIRMED**.

LADD, J., took no part.

THE CITY OF WAVERLY V. S. H. PAGE, *et al.*, Appellants.

Waters: INJUNCTIONS: *Municipal Corporations.* A city, which, in accordance with Acts Nineteenth General Assembly, chapter 89, section 3, and Code, 1873, section 527, has made substantial improvements of a permanent character to keep open the natural outlet for surface water flowing through a water course, may maintain an action to enjoin the obstruction of such water course by the owners of the land through which it runs, although it is dry at all times except in cases of melting snow or unusually heavy rains, at which times water flows into it only a few days at a time,

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where such diversion or obstruction may entail serious consequences on the city or the people interested in the drained territory.

Appeal from Bremer District Court.—HON. P. W. BURR,
Judge.

SATURDAY, APRIL 9, 1898.

ACTION in equity to restrain the defendants from filling or obstructing a water course within the corporate limits of the plaintiff. There was a hearing on the merits, and decree for the plaintiff. The defendants appeal—*Affirmed.*

G. W. Ruddick for appellants.

A. M. Potter and Gibson & Dawson for appellee.

ROBINSON, J.—The plaintiff is a city of the second class, organized and existing under the laws of this state. It includes territory on both sides of Cedar river, and is intersected from east to west by an important street, known as "Bremer Avenue." Through the central portion of that part of the territory west of the river extends a water course known as "Dry Run." It crosses Bremer avenue near, and east of, Aspen street, which extends from north to south, intersecting the avenue. The run has two branches, which drain about one thousand five hundred acres of land, and unite within the city limits at a considerable distance northwest of the crossing at the avenue. Penn street is parallel to, and about one hundred and forty rods north of it; and between the two, extending from east to west, are five other streets. The run crosses Penn street, and the distance from that crossing along the run, to the river into which it empties is three hundred and sixty-six rods, and the fall is about twenty-four

feet. The general course of the run from Penn street to the river, although irregular, is southward near Aspen street to the avenue; thence in a southeasterly direction to the river. From Penn street southward for a distance of forty-two rods, the water course is discernible, but does not have well-defined banks. The banks are more prominent further south, and from a point forty-two rods north of the avenue to the avenue are reasonably well-defined, although not sufficiently abrupt to prevent the cultivation of the ground by ordinary methods, and the running of a mowing machine over it. One half of the bed of the run from the avenue to Penn street has been cultivated, and the larger part of that which has not been cultivated is covered with sod. The banks south of the avenue are well defined, and gradually increase in height towards the river. The water course for a distance of fifty rods from the river is from eight to ten rods wide, and its banks are from ten to fifteen feet in height. The defendants own several lots at the intersection of the avenue and Aspen street, which are bounded on the south by the avenue, and on the west by Aspen street, and over which the water course extends. The lots are one hundred and ten feet wide from the east to west, and one hundred and thirty-two feet long; and the defendants have commenced to raise their surface about two and one-half feet, in order to erect thereon a dwelling house, and, if permitted to do so, will fill the water course. The effect of that would be to dam water which, if unobstructed, would flow over the bed of the run, and turn it onto lots and streets in the vicinity; and, if the street and other lots were so graded as to prevent that effect, a dam would be formed, which in times of high water would cause the overflow of a large portion of the city north of the

avenue, to the great injury of the numerous inhabitants of that territory.

The plaintiff contends that Dry run is a water course, of which it has control, and which it has controlled for many years; that the water course should have been kept open, for the purpose of draining the territory through which it extends; and that, should it be obstructed permanently, great and irreparable injury would result to the city, as well as to its inhabitants. The defendants admit that there is a slight depression in that part of the city designated as "Dry Run," but deny that it ever had any defined channel or banks as a water course, or that any water ever flows through it, excepting the surface water from unusual rainfalls, or other extraordinary causes, and that in such cases the flow is for but a few hours at a time; and they insist that they have a right to fill the depression in their lots in the manner described. They contend that the water which would flow north of the avenue could readily be turned along the streets and alleys eastward into the river, and that it is the right and the duty of the plaintiff to make provision for disposing of water from the territory specified, in that manner. There is not a constant flow of water through the water course in question. On the contrary, it is dry, excepting in case of melting snow or of unusually heavy rainfall; and on such occasions water flows into it but a few days at a time. It sometimes happens that when an exceptionally large quantity of water has fallen the water course is not sufficiently large to carry off to the river the water as fast as it accumulates, and that lots and streets in its vicinity are overflowed. The plaintiff has for many years assumed control of the run. It has provided artificial channels at some places, and has erected numerous bridges over it, at a great

expense. In the avenue south of the lots of the defendant are two foot bridges and one wagon bridge. A walled channel has been made, which commences at the avenue, and extends southward. It is sixteen feet wide and four feet deep, and is of about sufficient capacity to carry off the water which flows from north of the avenue in times of ordinary high water.

There are authorities which hold that depressions in the surface of the earth, through which water flows only in times of high water, are not water courses, within the meaning of the law which forbids the obstruction of water courses; and, within the rule of such authorities, Dry run, north of Bremer avenue, is not a water course, and any proprietor might lawfully obstruct the flow of water therein over his premises. See *Hoyt v. City of Hudson*, 27 Wis. 656; *Gibbs v. Williams*, 25 Kan. 214. The appellant also cites the cases of *City of Cedar Falls v. Hansen*, 104 Iowa, 189, and *Knostman & P. F. Co. v. City of Davenport*, 99 Iowa, 589, in support of the same doctrine. In the former of these two cases it appeared that the defendant owned three lots, in which there was a depression which furnished an outlet for surface water from a pond. The pond was filled, but surface water at times flowed from the same territory through the depression. The city improved the street near the lots, and in so doing made a ditch along one side of two of the lots, and turned it onto the third lot, so that water from the ditch passed into the depression on that lot. The defendant had placed a house over the depression, and was about to fill the lot to the level of the street, and thus make a permanent obstacle to the flow of water in the depression; and we held that he had the right to do so. That conclusion was based upon the rule that a city may bring its streets to grade; that by doing so, it may turn surface water from its natural course, and owners of lots below

grade cannot complain, because of their right to protect themselves by bringing their lots to grade. The fact was also mentioned that the city had changed the course through which water naturally flowed over two of the lots of the defendant. It was said, in effect, that, in view of the power of the city to make the changes it did without liability, the defendant should be permitted to bring his lot to grade, even though by so doing he obstructed the natural water way. In the *City of Davenport Case* the plaintiff sought to hold the city liable for alleged negligence in failing to provide adequate means for carrying off surface water. What was said in the two cases respecting the right of a lot owner to bring his lot to grade must be considered with the facts to which the statements made were applied. The characteristics of the depression considered in the *City of Cedar Falls Case* were somewhat like those of that part of Dry run north of Bremer avenue; but, so far as we are advised, the course which the city had pursued towards it, and the effect of obstructing it, were wholly unlike the course pursued by the city, and the effect to be apprehended from the proposed obstruction, in this case. The plaintiff had for many years followed the plan of keeping Dry run open for the discharge of surface water which should be gathered from the territory it drained north of Bremer avenue. An outlet for that water was a great and pressing necessity, and to maintain such an outlet the plaintiff made substantial and expensive improvements, of a permanent character, to keep open the natural outlet. What it did in that respect was authorized in section 3 of chapter 89 of the Acts of the Nineteenth General Assembly, which gave to cities the power "to deepen, widen, cover, wall, alter or change the channel of water courses within their corporate limits," and by section 527 of the Code of 1873, which provided that "the city

council shall have the care, supervision, and control of all public highways, bridges, streets, alleys, public squares and commons within the city, and shall cause the same to be kept open and in repair. * * * *

In the case of *Wharton v. Stevens*, 84 Iowa, 107, the proprietor of a farm claimed the right to obstruct the flow of surface water from an adjoining farm through a natural depression in the surface of the land; but we held that the right did not exist, and, in speaking of surface water, said: "When such water flows, by a well-defined and natural course, upon lower lands, that flow cannot be interfered with by either the upper or lower proprietor. But when such water has no defined course, but spreads out over the land without a well-defined course, it may be turned by the landowner in any direction. But where surface water has a fixed and certain course, as a swale, though it may be narrow or broad, its flow cannot be interrupted, to the injury of an adjoining proprietor." See, also, *Willitts v. Railway Co.*, 88 Iowa, 281; *Earl v. De Hart*, 12 N. J. Eq. 283; *Lambert v. Alcorn*, (Ill. Sup.), 33 N. E. Rep. 53. The rule announced in the case of *Wharton v. Stevens* is applicable in this case. The obstruction of Dry run in the manner proposed by the defendants is unauthorized, and would be followed by consequences too serious to the plaintiff and the people interested in the territory drained by the run to be permitted. The decree of the district court appears to be right, and it is AFFIRMED.

FURRY BROTHERS V. MATILDA S. FERGUSON *et al.*,
Appellants.

Lis Pendens: NOTICE: In October, 1895, plaintiff sued to subject certain land to a judgment. The following December term an entry was made in the appearance docket, "Settled as per stipulation

(not filed" which entry was made without knowledge of the parties, and was not discovered and corrected until May, 1896, when plaintiffs' motion to cancel the entry was sustained. In February, 1896, plaintiffs filed a trial notice, reciting that the cause would be called at the March term, which was entered on the appearance docket. The cause was continued March 5th at request of defendants, by an entry, "Continued by agreement of parties." Intervener purchased the property in dispute on March 7, 1896, in good faith and for value, relying upon the December entry, that the cause had been settled. It does not appear that plaintiffs were negligent in not sooner discovering said entry. *Held*, that the subsequent action by plaintiffs, reinstated the case, and it being before intervener's purchase, was constructive notice of plaintiffs' rights therein, under Code, 1873, section 2628, providing that when a petition has been filed, affecting real estate, the action is pending, so as to be notice thereof to third persons.

NEGLIGENCE OF AGENT. The failure of an agent who, as clerk of the district court, could have easily ascertained whether an action affecting the property he was employed to buy had been dismissed, as appeared by the records, or was still pending, must be imputed to his principal, who must be held to have due notice of the rights of plaintiffs therein at the time of the purchase from defendants.

Appeal from Hardin District Court.—HON. D. R. HINDMAN, Judge.

SATURDAY, APRIL 9, 1898.

ACTION in equity to subject certain real estate to the payment of a judgment owned by the plaintiffs. Fannie W. Crockett intervened. There was a hearing on the merits, and a decision for the plaintiffs. The defendants and intervener appeal.—*Affirmed*.

Huff & Ward for appellants.

M. J. Furry and *Albrook & Lundy* for appellee.

ROBINSON, J.—On the eighth day of October, 1895, the district court of Hardin county rendered a judgment in favor of the plaintiffs and against the defendant Henry Ferguson for the sum of one hundred and fifty-seven dollars and fifty-three cents, and for an attorney's

fee and costs. That judgment was rendered on account of a debt which was contracted not later than the eighth day of September, 1894, and is unsatisfied. On the sixth day of November, 1894, Henry Ferguson conveyed a quarter section of land which he then owned, in exchange for the west one-half of lots numbered 6 and 7 in block numbered 6 in the town of Eldora, and caused the title to the property thus acquired to be transferred to his wife and co-defendant, Matilda S. Ferguson. This action was brought to subject that property to the payment of the judgment, upon the grounds that the consideration for the property was wholly paid by Henry Ferguson, and that it was conveyed to his wife for the purpose of defeating the collection of the plaintiff's claim. The Fergusons filed an answer in which they alleged that, several years prior to the conveyance of the property to Mrs. Ferguson, she loaned to her husband, at different times, money to the amount of three thousand dollars, and that the property was conveyed to her as a compromise and in settlement of the claim she held against her husband for the money so loaned. In April, 1896, Fannie W. Crockett intervened in this action, and claims to own the property conveyed to Mrs. Ferguson by virtue of a warranty deed therefor executed to the intervener by Mrs. Ferguson and her husband on the seventh day of March, 1896. The intervener claims to have purchased the property in good faith, without knowledge or notice of the rights of the plaintiffs; and she asks that the plaintiffs' petition be dismissed and that she be granted general equitable relief.

Although the defendants took an appeal, they have not perfected it, and are not entitled to any relief. The controversy in this court is in regard to the rights of the intervener, and the facts in regard to them appear

to be as follows: On the twenty-eighth day of October, 1895, this action was commenced, and the petition of the plaintiffs was filed. At the term of court held in December, 1895, the judge of the court wrote in the court calendar the following: "Settled as per stipulation filed." That entry appears to have been carried into the court record book. At a later time the deputy clerk of the court made in the appearance docket, in the portion devoted to this case, an entry in words as follows: "Settled as per stipulation (not filed)." No stipulation had been entered into. The entry made by the judge was wholly without authority, and without the knowledge of the plaintiffs, and, so far as the facts appear, was unknown to any one connected with the case. The entries in the court record and in the appearance docket were also made without the knowledge of the plaintiffs, and were based upon the entry made by the judge. On the twenty-first day of February, 1896, the plaintiffs filed a trial notice, the filing of which was entered in the appearance docket. The notice stated that the cause would be called for trial at the March term, which was the one next following the December term, and commenced on the second day of March, 1896. The cause was entered on the calendar for that term. On the third day of the term the cause was continued at the request of the defendant, and the entry, "continued by agreement of parties," was made in the court record. The plaintiffs did not learn of the entry of December, 1895, until about the twelfth day of May, 1896, when a motion to correct the record by setting aside and canceling the December entry was made and sustained, without objection. The intervenor claims that in purchasing the property in question she relied upon the December entry, and had no knowledge that the action had not been settled. The evidence shows that she did not have actual knowledge

of the fact that the case had not been settled, and that in making the purchase she relied upon an abstract of title which did not show that the action was pending. We think the conclusion is fully warranted that the intervener is an innocent purchaser for value, unless she had constructive notice of rights of the plaintiffs. Section 2628 of the Code of 1873: is as follows: "When a petition has been filed affecting real estate, the action is pending so as to charge third persons with notice of its pendency, and while pending no interest can be acquired by third persons in the subject-matter thereof as against the plaintiff's title, if the real property affected be situated in the county where the petition is filed." The petition filed by the plaintiffs was sufficient to charge third persons with notice of the plaintiff's interest in the land, and the evidence shows that they were entitled to the relief they asked, as against the defendants and third persons having notice of their rights. It is contended, however, that the effect of the December entry was to terminate the action, and that it then ceased to be effectual as notice to third persons of the rights of the plaintiffs. To determine the effect of what was done, however, the entire record, as it existed when the intervener purchased the property in question, must be considered. The December entry did not purport to dismiss the case, although, taken alone, it would have justified the conclusion that the case was at an end. But the trial notice subsequently filed was evidence that the plaintiff did not consider the case settled, and the notice was authorized by a rule of practice duly adopted, of which litigants and persons concerned in the litigation were required to take notice. See rules adopted by convention of district judges, January 5, 1887; *David v. Insurance Co.*, 9 Iowa, 45; Code 1873, section 2709. The cause was on the calendar for the March term, and had been noticed for trial at that

term, and the record showed that it had been continued by agreement of parties when the intervenor's purchase was made. If it be conceded that the December entry, unmodified, would have had the effect to end the case, the subsequent action of the parties had the effect to reinstate it. Had the intervenor examined the record, she would have found that the parties to the action treated it as pending, and that the December entry was based upon an alleged stipulation which had not been filed. The entry was void as between the parties to

2 the action, and persons having notice of its true character had no right to rely upon it. The plaintiffs are not shown to have been negligent in not discovering sooner than they did that it had been made. The record disclosed such facts as would have caused a person of common prudence and reasonable diligence to make inquiries which would have disclosed the fact that the December entry was unauthorized and that the action was still pending. The intervenor was represented in the purchase of the property in question by her agent, Frank W. Crockett. He was at the time the clerk of the district court, and could readily have ascertained the true condition of this case. His failure to do so must be imputed to his principal, and she must be held to have had due and sufficient notice of the rights of the plaintiffs when her purchase was made. *Insurance Co. v. Bishop*, 69 Iowa, 645; *English v. Waples*, 13 Iowa, 57. Since this action was then pending she acquired the property subject to the right of the plaintiffs to enforce their judgment against it.

The district court found that the December entry was void, that third persons had constructive notice of that fact, and that the property in controversy should be subjected to the payment of Ferguson's debts, and a decree for the plaintiffs was directed. The appellees make some objection to the right of the intervenor to

appeal from the decision of the court, but we think it was sufficient to give this court jurisdiction of the case, and it is **AFFIRMED**.

J. P. GALLAGHER V. W. F. GINGRICH AND C. O. GINGRICH,
Defendants, ALVORD SAVINGS BANK, Appellant.

Receivers: EXPENSES OF: Priority. The compensation and expenses of the receivership will not be deferred to payment of existing liens where the appointment of the receiver is legal, although the appointment was made without prejudice to the pre-existing liens, and the assets are insufficient to pay them and the expenses of the receivership. *Distinguishing Hanna v. State Trust Company*, 36 U. S. App. 61; 70 Fed. Rep. 2; 30 L. R. A. 201; 16 C. C. A. 586.

Appeal from Lyon District Court.—HON. GEORGE W. WAKEFIELD. Judge.

SATURDAY, APRIL 9, 1898.

PLAINTIFF brought this action against the defendants, his co-partners, doing business under the name of Alvord Milling Company, alleging that said co-partnership was insolvent, and praying that its affairs be wound up and a receiver appointed. By consent of said co-partners, E. H. Parch was appointed receiver, and proceeded to settle the affairs of said co-partnership under the orders of the court. The Alvord Savings Bank, a creditor of said co-partnership, had an attachment lien upon the property of the co-partnership at the time the receiver was appointed, subject to several other liens prior thereto. Under an order of the court, the receiver sold the property, said Alvord Savings Bank being the purchaser. In closing up the affairs of said receivership, it was ordered by the court that the receiver be allowed a compensation of sixty dollars per month from January 28 to November 26,

105	237
1108	295

105	237
124	532

1895, and fifty dollars were allowed for the receiver's attorney. It was also ordered that certain sums be allowed to the miller and to the engineer employed by the receiver in operating the mill, and that fifteen dollars and eleven cents for coal be also allowed. It was also ordered "that the receiver's expenses be a first charge upon the proceeds of the property sold by the receiver. The purchaser of said property, the Alvord Savings Bank, is hereby ordered to pay into the hands of the receiver the purchase price of the property so sold, the sum of five hundred fifty-three and 26-100 dollars, to all of which the Alvord Savings Bank excepts." From this order, the Alvord Savings Bank appeals.—*Affirmed.*

J. M. Parsons for appellant *Alvord Sav. Bank.*

E. E. Wagner for appellee *E. H. Parch.*

GIVEN, J.—The proceeds arising from the sale of the partnership property are insufficient to pay the several liens thereon and costs and expenses of the receivership. Appellant, holding the junior claim, and being the purchaser of the property, insists that the receiver took the property subject to all liens existing against it at the time; that the liens are entitled to preference over the costs and expenses of the receivership; and that, if the assets are not sufficient to pay both, the receiver must look to the parties who caused his appointment for his compensation and expenses. *Hanna v. Trust Co.*, 16 C. C. A. 586 (70 Fed. 2), is relied upon to support this contention. The question of the expenses of the receiver incurred in winding up the business was not involved in that case. The contention was as to whether the receiver should be permitted to borrow

money for the purpose of continuing the business and carrying out the contracts of the insolvent debtor. In *Radford v. Folsom*, 55 Iowa, 276, it is said: "It is believed that the authorities uniformly hold that when no question is made as to the legality and propriety of the appointment of the receiver, and he has closed up the business in pursuance of his appointment, his compensation should be paid from the funds in his hands." See, also, *Jaffray v. Raab*, 72 Iowa, 335; *St. Paul Title, Insurance & Trust Co. v. Diagonal Coal Co.*, 95 Iowa, 551. No question was made as to the legality and propriety of the appointment of this receiver; neither was it questioned that the items allowed were just. The contention is that their payment must be deferred to the payment of existing liens, but such is not the law.

The fact that the appointment of the receiver was made without prejudice to any liens of the appellant acquired by its attachment did not deprive the court of the right to order the expenses of the receivership to be first paid out of the assets. The judgment is AFFIRMED.

LADD, J., takes no part.

KINSEY ELWOOD V. NICHOLAS O'BRIEN AND JAMES CLANCY, HIS GUARDIAN, Appellants.

Insane Persons: CONTRACTS. A contract cannot be avoided on the ground that one of the parties thereto was insane or of unsound mind when he entered into a contract, free from fraud or undue influence and made upon adequate consideration, unless such unsoundness or insanity was of such character that he had no reasonable perception or understanding of the nature and terms of the contract.

EVIDENCE. It will be presumed that a person was sane when he executed a contract, although he was adjudged insane eight days thereafter.

106	239
121	226
122	546
105	239
131	716
105	239
133	684

Appeal from Howard District Court.—HON. A. N. HOBSON, Judge.

SATURDAY, APRIL 9, 1898.

SUIT in equity for the specific performance of a contract for the sale of real estate. Defense, unsoundness of mind and incapacity of the vendor, O'Brien. Trial to the court. Decree for plaintiff, and defendants appeal.—*Affirmed.*

C. C. Upton and Stephen Mahoney for appellants.

H. T. Reed for appellee.

DEEMER, C. J.—The execution of the contract, the payment of a part of the consideration, and a tender of the remainder, are all admitted. The sole issue in the case relates to appellant O'Brien's condition of mind at the time he entered into the contract. The contract was made on November 14, 1894. On the twenty-second day of the same month, O'Brien was taken before the board of insane commissioners of Howard county, adjudged insane, and taken to the hospital at Independence, from which place he has never been discharged, so far as shown. The contention now made in his behalf is that he was so far demented and unsound of mind at the time the contract was made that it should not be enforced. This is almost wholly a question of fact, and a discussion of the evidence adduced would accomplish no useful purpose.

1 The presumption is that he was sane when the contract was made, and the burden is upon the appellants to show that he was not, and that he was in fact incapacitated from making the contract. In order to avoid the contract, it must appear, not only that defendant was unsound of mind, or insane, when it

was made, but that this unsoundness or insanity was of such character as that he had no reasonable perception or understanding of the nature and terms of the contract. Mere weakness of mind, or unsoundness to some degree, is not sufficient, in the absence of fraud or undue influence, to invalidate a contract. *Campbell v. Campbell*, 51 Iowa, 713; *Burgess v. Pollock*, 53 Iowa, 273. The doctors who have charge of O'Brien at the hospital say that he had partial or primary dementia when he came to that institution, and that this disability probably existed at the time the contract was entered into. That O'Brien was, and had been for many years prior to the making of the contract, peculiar in his methods and conduct, is conceded. But we find that he looked after his business affairs with judgment and discretion, and exercised at least an ordinary degree of foresight and intelligence in all his dealings. The contract is entirely free from fraud or undue influence, and the consideration agreed to be paid is not inadequate. We are constrained to believe that O'Brien fully understood and comprehended the nature and effect of the transaction, and that while his mind was to some extent unbalanced, and he was troubled with partial dementia, yet he had that judgment and discretion, that understanding of the effect of the agreement, that he should be held bound thereby. After O'Brien was taken to the hospital, he wrote two letters, referring to business matters connected with his farm, and to the contract which is at the bottom of this controversy, which clearly indicate that he was possessed of memory and understanding, and was qualified to judge of the care his property needed, and of the effect of his contract with appellee. These letters afford strong evidence of appellant's competency to transact business. Without referring more in detail to the evidence before us, it is sufficient to say that we

are all agreed in holding that there is no such showing of incompetency as will justify a court in denying the relief asked. Suggestion is made in argument that the contract is ambiguous, and that the consideration is inadequate. Neither of these claims are of sufficient merit to justify extended consideration. They are fully answered by what is said in the case of *Throckmorton v. Davidson*, 68 Iowa, 643. The decree of the district court is **AFFIRMED**.

MARGARET JOHNSON, Appellant, v. **MARY CLANCY**, who also calls herself **MARY CRAIG**.

LLOYD JOHNSON, minor by next friend, Appellant, v. **SAME**, Defendant.

Marriage: **SUFFICIENCY OF EVIDENCE TO ESTABLISH.** A man induced a married woman to live with him, and paid the expenses of a divorce secured by her. He often declared that he would like to marry her, and fear of giving offense to his sister, alone restrained him. She testified that July 27th they went to a distant town and were married, and produced a certificate dated July 28th, which she claimed was a mistake in date. He could sign his name with great difficulty, and the procurer of the license signed the record with a mark. Acquaintances of both parties testified to their going and returning from said town on the 27th, and a number testified that she was home all day the 28th. July 31st he had the scrivener of his will prepare a bequest for her in her maiden name. He died in September, and she alone cared for him in his last sickness. His relatives claim that on July 28th another person impersonated him when they were married, and all witnesses to the marriage except one described a certain man, who was proved to be elsewhere on that day. *Held*, that they were married.

SAME. A finding that defendant was the widow of plaintiff's testator is sustained by the evidence already set out, that testator and defendant were at one time engaged to be married and the engagement was broken off because of a quarrel and that defendant married another person, that the testator succeeded in inducing her to leave her husband and maintain illicit relations with him, that he induced her to secure a divorce from her husband, paying all the expenses, that defendant was married to some one stated in the marriage certificate to bear the same name as the testator,

that the testator stated he was going to the place where the marriage occurred to be married on the day before the date of the marriage certificate and that during his last illness defendant cared for him night and day rendering all the most private offices, although the evidence shows that the marriage could not have occurred on the date of the certificate.

Appeal from Adair District Court.—HON. A. W. WILKINSON, Judge.

SATURDAY, APRIL 9, 1898.

THESE cases involve the same issue. They were tried together below, and are so submitted here. The plaintiffs are devisees of different tracts of land in Adair county, under the will of one John Craig, deceased, and as such they bring these actions to quiet their respective titles. The defendant claims to be the widow of said Craig, and entitled to the one-third part of said real estate. She asks that her title thereto be quieted, and her interest admeasured and set apart to her. The facts are fully set out in the opinion. There was a decree in defendant's favor, and plaintiffs appeal. The defendant also gave notice of appeal, but she expressly abandons, here, any claim under it.—*Affirmed.*

Henderson & Berry and *Gaines & Gaines* for appellants.

Neal & Neal and *James W. Boyd* for appellee.

WATERMAN, J.—The voluminous record in this case presents but a single question, and that is one purely of fact. Was Mary Clancy married to John Craig? The testimony is in irreconcilable conflict. It would serve no good purpose to set out the details here, but we shall endeavor to give such an outline of the case as will afford an understanding of the claims of the respective

parties and of our reasons for the conclusion at which we have arrived. The lower court properly held that the burden was on the defendant to establish the marriage, so we shall take up first the case as she presents it. Her own testimony, we will say, was received without objection. John Craig was a locomotive fireman, who for some years immediately prior to his death made his home at St. Joseph, Missouri. He became acquainted with the defendant in 1886, when she was just verging into womanhood. An attachment grew up between them, and in time there was an engagement of marriage. This was broken off by reason of a quarrel, and about the year 1889 defendant went to Cheyenne, Wyo., where she married a man named Baker. After a time Craig followed her to Cheyenne, and endeavored to induce her to leave Baker, and live with him. Finally, Craig's efforts were successful; the defendant left Baker, and returned to St. Joseph; her railroad fare being paid by Craig. Here she and Craig maintained illicit relations. Through his inducements she was led to secure a divorce from Baker; Craig paying all the expense of the proceeding. This divorce was obtained at Savannah, Missouri, July 18, 1894. For some time prior to his death Craig had been in failing health. His disease was consumption, and in July, 1894, it had progressed so far that his condition was critical, but the evidence is in conflict as to whether his appearance would have given any indication of his real condition to a casual observer. Craig often stated his desire to marry defendant, and said that he was only restrained from doing so through fear of giving offense to his sister, the plaintiff in the first of these actions. He had become alienated from his mother and his other sisters and his brothers, and he expressed the wish to maintain pleasant relations with plaintiff, Mrs. Johnson.

II. So far the facts are practically undisputed. It is at this point that the real contest begins. It is claimed by defendant that Craig intended to go to Iowa to arrange his business there, and then return, and go with her to Texas to live. That he was to leave for Iowa in the evening of July 27, 1894, and that in the morning of that day, at his request, she went with him to Savannah, Missouri, where they were married. Savannah is sometwenty miles distant from St. Joseph. The marriage occurred about noon, and defendant and Craig then returned to St. Joseph. The marriage certificate bears date of July 28th. This, defendant says, is a mistake. It is undisputed that Craig left St. Joseph for Adair county, Iowa, in the evening of the twenty-seventh, and arrived there early in the day of the twenty-eighth, so that it was physically impossible that he could have been in Savannah on the latter date. That a marriage ceremony was performed on one of those two days is conceded, and that defendant was one of the principals. Did she marry John Craig, or did she procure some man to falsely personate John Craig for this occasion? Defendant's story is corroborated in this way: A witness, who was well acquainted both with Craig and defendant, accompanied them a short distance on the train when they started for Savannah, and was told by Craig they were going there to be married. On their return to St. Joseph in the afternoon, another person was met, who testifies that the marriage certificate was exhibited to her; and still another witness, who knew both, saw them in St. Joseph after their return, as they were waiting to take a street car, and was told by Craig that they had come from Savannah. There is still other corroborative evidence. One witness testifies that Craig told him of his purpose to marry defendant secretly; another swears that defendant was absent from home on the 27th; while a number aver that she

was at home all day of the twenty-eighth. Craig's reason for going to Savannah to be married, as given by defendant, was that the fact of their marriage might not get into the St. Joseph newspapers, and thus become known to his sister. On the other hand, the undisputed testimony discloses that the marriage license issued by the clerk of the court bears date the twenty-eighth, as already said. The clerk's cash book and his official account of the receipt of the fee for the license show the same date, and so, also, does the certificate of the justice of the peace who performed the ceremony. It may be well to say here that the justice inspected the license before he solemnized the marriage. The newspapers of Savannah, some days later, published notice of the wedding as having occurred on the twenty-eighth. Their information was obtained from the justice. In estimating the probative force of these circumstances, we must remember that they are not independent facts speaking necessarily each for itself, but they make up a related series of transactions. It is not at all improbable that a mistake in the date of the license may have led to an erroneous date in each of the other instances. All of these dates speak but little, if any, more strongly than the date of the license alone; and it rests, with an exception of which we shall next speak, upon no firmer foundation than the probability that the clerk of the court would not make a mistake in this respect. Aside from these dates, to show that the marriage occurred on the twenty-eighth, an employe in the clerk's office,—a Mrs. Ensor,—testified that on that day the clerk came into the office, and said he had been to the depot to see a couple who had taken out a license that forenoon. The clerk says it was defendant and her husband he went to see, but he does not fix the day. Mrs. Ensor professes to remember that it was the twenty-eighth, because that was her child's birthday

There is no such relation between the two facts of the clerk's speaking to her and her child's birthday as will give her evidence any greater weight than should be accorded to mere recollection of a trivial incident, first called to her mind some two months after its occurrence. The clerk who issued the license, the justice of the peace who performed the ceremony, a lawyer who was present at the wedding, and at least one other witness, describe the man whom defendant married. They did not know Craig. They expressed no opinion as to whether he was the man. They merely, from recollection, attempt to describe the dress and appearance of the person who represented himself as Craig on this occasion, and, with a single exception that will be mentioned, they depict a person quite unlike Craig. Their attention was first called to the incident about two months after the wedding. It is generally recognized that there are no matters upon which human testimony is so fallible as those relating to personal identity. The evidence here affords some confirmation of this fact. The witnesses either agree too well or they disagree. Van Buskirk gives a description that was fairly answered by Craig; while three others, whose suspicions had been directed towards one Walton as the personator of Craig, give an exact and careful description of the former. It is beyond dispute that he was not in Savannah on the twenty-eighth. Another fact which it is claimed tends strongly to show that the person who married defendant was not Craig is that when he procured the license he signed the record with a mark, while Craig could write his name. It is true that he could write his name, but it is also true that he could write nothing else. Even this required most painstaking effort. Under all the circumstances, it seems quite likely that he may have felt disinclined to undertake what to him was always something of a task, and simply made

a mark. In Craig's will, which was executed in Adair county on July 31, 1894, there is a bequest to the defendant in these words: "Two hundred dollars a year to be paid to my friend, Mrs. Mary Clancy, of St. Joe, Mo." Judge Story, who drew the will, says in his testimony that he may have put in the word "friend," but that Craig spoke of her as Mary Clancy. It should be remembered in this connection, and in connection also with the fact that he did not speak of defendant as his wife, even after she came to Adair county, as it will hereafter appear she did, that he was dying at the house of a sister from whom he was specially desirous of concealing his marriage.

III. In addition to what we have said there are some general features of the case that impress us as weighty. The relations existing between Craig and defendant prior to July 27, 1894, their feelings towards each other, as expressed by what each said and did, render the fact of their marriage probable. And it seems incredible that defendant, while expecting Craig's return in a few days, should go to a town where she was known, on the day following his departure, and have a false ceremony performed, and then, when asked to do so, exhibit to Judge Story, who was acting for plaintiff, the marriage certificate that, as she and he well knew, if the marriage occurred on the twenty-eighth, bore upon its face the stamp of its own falsity. After Craig reached Adair county, his health rapidly failed. About August 3d, at his request, a telegram was sent to defendant, asking her to come to him. She did so at once, and from that time until he died, on September 23d following, she cared for him night and day, rendering him all the most private offices. In his extremity Craig received but little attention, and less aid, from those members of his family from whom he was estranged. Even the plaintiff was quite willing to yield

the place at his bedside to the woman whose claim she now resists. In view of the defendant's boundless affection for Craig, and the great sacrifice of duty and honor that she made for his sake, one would think that the sister might now accord her the rights, as freely as she once imposed on her the duties, of a wife, and this, too, even if no formal marriage ceremony had taken place. But we find that there was a marriage ceremony. Making all due allowance for some questionable statements by defendant on collateral matters, we are impressed with the conviction that the testimony of the disinterested witnesses in her behalf, supported as it is by the probabilities arising from undenied circumstances, establishes her claim to being the lawful widow of John Craig. The decree of the trial court in each case will be **AFFIRMED**.

LULU BOYCE v. C. S. ALLEN, Appellant.

Instructions Construed. An instruction that defendant was to be allowed credit only for the debt due to him from plaintiff, and for attachment claims of other persons against plaintiff paid by defendant, is not ground for reversal although he paid another debt of plaintiff, where the jury were told in another instruction to allow defendant credit for all money paid by him in accordance with the agreement between him and plaintiff, and there is a dispute as to whether he was authorized to pay anything except attachment claims.

Transfer to Equity. Plaintiff sued for the price of certain real and personal property conveyed by warranty deed and bill of sale, and alleged that the instruments, though absolute in form, were given
 1 only as security, but did not allege fraud or mistake, nor ask to
 2 set aside or reform them, nor for the establishment of any trust in
 3 the property conveyed, or the proceeds thereof, nor any equitable relief whatever, but asked for the difference between what defendant agreed to pay for the property and the credits he was entitled to. The defendant admitted the execution of the instruments, denied the other allegations, and pleaded payment and settlement. *Held*, the issue thus made was one of law, and the court properly refused to transfer it to equity for trial.

106	249
116	502
106	249
123	498

Appeal: CURING ERROR. Error in admitting evidence is cured by withdrawing it from the jury, by instructions.

Appeal from Humboldt District Court.—HON. LOT THOMAS, Judge.

SATURDAY, APRIL 9, 1898.

PLAINTIFF'S amended and substituted petition is it six counts, which, with the answers thereto, are, in substance, as follows: In the first she alleges: That on January 5, 1892, she was the owner of the west one-half of section 2-93-34, Pocahontas county, Iowa. That she and her husband, J. M. Boyce, were each indebted to the defendant, and that defendant had commenced an action thereon against them, aided by attachment, for the sum of seven hundred dollars. That, in addition thereto, attachment suits had been commenced against plaintiff and her husband by L. J. Larson for one hundred and sixteen dollars, G. T. & S. D. Johnson for one hundred and seventy dollars, and by Sniggs Bros. & Lumblad for eighty-six dollars and fifty-four cents. That on said day defendant, being desirous of getting security for his claim, orally agreed with plaintiff to take up the indebtedness to said other attaching creditors, and hold the same until the plaintiff was able to sell her land, and repay the same, upon condition that plaintiff should convey said land to defendant as security for his claim and said other claims. That said conveyance, while in form a deed, was a mortgage, only, for the purposes aforesaid, and that the plaintiff reserved the right to redeem the said land by payment, or by the sale of the land by herself or agent, and the payment of said indebtedness. That defendant, being a land agent, had promised to sell the land, as agent for plaintiff, for a commission of one dollar per acre,

in case she or her husband did not sell the same. That defendant did sell said land for the plaintiff for the sum of twenty-one dollars and fifty cents per acre, but refuses to pay the proceeds of said sale in excess of said claims, wherefore there is due to plaintiff about the sum of two thousand dollars, with interest from date of sale. Answering this first count, defendant admits that the land stood in plaintiff's name, and that the same was conveyed to him by her and her husband. He denies every other allegation in said count, and, as further defense, states, in substance, as follows: That said conveyance was made for the agreed consideration of five thousand, two hundred and eighty-six dollars, a part of which was a mortgage of three thousand, five hundred dollars, then standing against said land. That the indebtedness of plaintiff and her husband was largely in excess of the difference between said agreed consideration and mortgage, and that it was agreed that said balance, to-wit, one thousand, seven hundred and eighty-six dollars should be paid by defendants taking up and canceling the indebtedness of John M. Boyce to that amount, and that such indebtedness has been taken up and canceled by defendant. As further defense, he alleges that prior to the commencement of this suit all matters growing out of said sale of said real estate were settled in full between the parties. In the second count of her petition the plaintiff restates the matters set up in the first, and alleges that, as a part of said agreement and transaction, and for the same purpose, her husband made to defendant a bill of sale on certain personal property described, absolute in form, but intended only as security for said debts, which personal property was of the value of one thousand, one hundred dollars. That defendant was either to sell said property, and apply the proceeds on said debt, or to account for the value of any that he did not

sell. That defendant sold or converted said property to his own use, and that there remains in his hands from the amount derived from the sale of said real estate and from said personal property, over and above the amount of said indebtedness, the sum of four thousand dollars, which defendant refuses to pay; and that John M. Boyce assigned his interest therein to the plaintiff. Defendant, in answer to said second count, admits the conveyance of the land, and the execution to him of the bill of sale, and denies every other allegation in said count. He re-affirms the allegations of his answer to the first count as to the real estate transaction, and as to the bill of sale alleges, in substance, as follows: That as to all of said personal property except the hay John M. Boyce was to be allowed the price to be fixed by himself, defendant, and one Willey, and for the hay the amount that would be realized from a sale thereof; and that the value so fixed and amount so realized were to be applied on account of said indebtedness, and that the amount of said debts far exceeded the sum to be thus accounted for. In her third count plaintiff restates the allegations of the second as to said bill of sale, and avers that defendant has sold a portion of said property, and converted the balance to his own use; that, after satisfying said debts, there remains in his hands property to the amount of the value of several hundred dollars, for which he refuses to account; and that John M. Boyce has assigned his interest therein to the plaintiff. In answer to the third count, defendant admits the execution of the bill of sale, and denies every other allegation in the count. He re-affirms the matters alleged in answer to the second count as to the bill of sale and indebtedness, and alleges that prior to the commencement of this suit all matters growing out of said bill of sale were fully settled between the parties. In the fifth count of her

petition, plaintiff restates the matters alleged in the first with respect to the conveyance of said real estate, and further alleges that defendant sold said land for twenty-one dollars and fifty cents per acre; that there is coming to plaintiff on account of said sale of the land the sum of about two thousand dollars after payment of all the claims for which the land was pledged; that defendant refuses to pay the same,—wherefore plaintiff asks to recover two thousand dollars. To this count the defendant makes answer the same as to the first count. In the sixth count plaintiff alleges that defendant, as her agent, rented said land for about five hundred dollars, and that he has collected said rent, and refuses to pay the same to plaintiff; wherefore she asks to recover five hundred dollars. To this count defendant answers, denying each and every allegation contained therein. In the fourth count of her petition, plaintiff states a cause of action in the ordinary form for damages on the attachment bond given by defendant in his action against the plaintiff and John M. Boyce, and alleges that John M. Boyce has assigned his interest in said claim to the plaintiff; wherefore she asks to recover one thousand, five hundred dollars actual and exemplary damages. Defendant, in answer, admits the issue of the attachment, the filing of the bond, and that no damages have been paid, and denies every other allegation in said count. He alleges as further defense that he had reasonable cause to believe the grounds alleged for the attachment to be true, that he acted upon the advice of counsel, that plaintiff and her husband acquiesced in and submitted to said attachment, and that all matters arising thereunder were fully settled, and the attachment dissolved. In conclusion of her petition, plaintiff demands judgment against said defendant in the sum of six thousand dollars and costs of this action.

Issues being thus joined, defendant moved to transfer the issues raised by the first, second, and fifth counts of the amended and substituted petition to equity for trial, which motion was overruled, and on the ninth day of April, 1895, the case was tried to a jury. A verdict was returned in favor of the plaintiff for two thousand, two hundred and seventeen dollars and eighty-seven cents, together with certain special findings. Defendant's motion for new trial being overruled, judgment was entered upon the verdict. Defendant appeals.—*Affirmed.*

Frank Farrell, T. D. Healy and R. M. Wright for appellant.

S. H. Kerr, W. S. Kenyon and J. A. O. Yeoman for appellee.

GIVEN, J.—I. The following facts are conceded, or so established as not to be controverted: On January 5, 1892, the plaintiff was the owner of said land, and on that day she and her husband conveyed the same to the defendant by an instrument purporting to be a warranty deed. At that time John M. Boyce
2 was the owner of the personal property described in the petition, and on said day he executed to the defendant a bill of sale thereof for the consideration of four hundred dollars, which bill of sale purported to be an absolute conveyance. At and prior to said date plaintiff and her husband were indebted to the defendant, and Mr. Boyce was also indebted to L. J. Larson, G. T. & S. D. Johnson, to Sniggs Bros. & Lumblad, and, prior to said fifth day of January, 1892, each of these creditors had commenced actions and sued out attachments on their claims, and caused the

same to be levied upon said land and personal property. John M. Boyce was also indebted to the McCormick Harvester Machine Company, upon which an attachment was sued out, and levied on his property about, or a little before, said conveyances were filed for record. The defendant assumed or satisfied the mortgage standing against the land, and also assumed or satisfied the claims of said several attaching creditors, and entered satisfaction of his own claim. There is no question but that John M. Boyce assigned his interest in these several claims to the plaintiff before the commencement of this action.

II. Appellant's first complaint is of the overruling of his motion to transfer the issues joined on the first, second, and fifth counts of the petition to equity

for trial. This complaint is grounded upon the
3 claim that plaintiff cannot have the relief asked

in these counts until the deed and bill of sale are reformed so as to make them conditional, instead of absolute, conveyances, and that equity alone can grant such reformation. It is true that the plaintiff alleges that, although absolute in form, these conveyances were given only as security; but she does not allege that there was either fraud or mistake in their execution. They were made just as intended. Plaintiff does not ask to set aside or reform these instruments, nor does she ask for the establishment of any trust or lien upon the property conveyed, or the proceeds thereof. She asks for no equitable relief whatever, but simply that the defendant be charged with the considerations which he agreed to pay for said properties, and credited with the amount due to himself, and the amounts paid by him to the other attaching creditors, and that plaintiff have judgment for the balance. To entitle the plaintiff to recover, it is only necessary to find the actual consideration which

defendant was to pay for these properties, and to credit him with what he has paid in accordance with the agreement of the parties. The bill of sale recites a consideration of four hundred dollars, yet, as we have seen, each party alleges a different consideration. Appellant cites *Carey v. Gunnison*, 65 Iowa, 702,—an action to recover for a breach of contract, in which defendant answered, setting up fraud and mutual mistake in the execution of the contract as a defense, but without asking for any affirmative relief. It was held that the legal effect of this answer was to show that there was no contract, and that the issue so raised was not an equitable one. While this case is not directly in point, we think it tends to sustain the ruling of the court below. *Price v. Insurance Co.*, 80 Iowa, 408, is also cited. It is said in that case: "The only demand for judgment appears in the petition, and is for the amount of the policy and costs. The plaintiff might have so drawn his pleadings as to demand the cancellation of the alleged deed of conveyance and the setting aside of the alleged settlement, but he did not do so. That the pleadings set out facts which, if true, would entitle plaintiff to equitable relief, is immaterial, so long as such relief is not demanded. An issue is not equitable, within the meaning of the section quoted, so long as the relief asked or the defense interposed is not equitable. In *McMillan v. Bissell*, 63 Mich. 70 (29 N. W. Rep. 739), it is said: "The agreement for the defeasance, whether written or unwritten, is no more than one of the conditions upon which the deed was given, and therefore constitutes a part of the consideration for the conveyance; and I have never been able to discover why it was not competent to show it by parol in any case, either in law or in equity, where it was competent to show the actual consideration for the conveyances." See, also, *McAnnulty v. Seick*, 59 Iowa,

586; *Miller v. Kendig*, 55 Iowa, 174; *Yager v. Bank*, (—, Neb.—) (72 N. W. Rep. 211). There was no error in overruling the motion to transfer to equity.

III. Following this first contention, appellant's counsel present, under six different heads, various claims based upon the evidence, and which may be summed up as presenting the inquiry whether the verdict is in accordance with the instructions and evidence. We will not follow the lengthy, yet able, discussion of the evidence, as to do so would extend this opinion to an unwarranted length, and serve no good purpose. It is sufficient to say that we have read the evidence and instructions with care, and are of the opinion that the verdict is in harmony with the instructions, and that it has such support in the evidence as that, under familiar rules, we would not be warranted in disturbing it. We may say, in this connection, that we have considered the various exceptions to rulings of the court in taking testimony, and do not find any errors therein prejudicial to the appellant except in admitting a certain conversation between one
4 Willey and the plaintiff and her husband. This error, however, was cured in the instructions by withdrawing said evidence from the consideration of the jury, because it had not been made to appear that Willey had authority to bind the defendant.

IV. Appellant's next contention is that the court erred in instructions 11, 16, and 21 in limiting the credits to be allowed defendant to his own and the attachment claims, thus excluding the claim of
5 one Bunton. Mr. Bunton, being called, as to the value of the land, testified that he had been in the lumber business in 1892; that he had a mechanic's lien on Boyce's land for three hundred and eight dollars and twelve cents; that he was familiar with the amount of lumber that had been put on the place; and says,

"I think he got all the lumber from me." In defendant's statement of the account he credits himself: "C. H. Bunton vs. Boyce, \$308.39; interest \$.25; taxes, 1891, \$76.05." Instruction 11 states the undisputed facts substantially as we have stated them, and without any direction as to what should or should not be allowed in the way of credits to the defendant. Instruction 16 directs the jury that the defendant was authorized to discharge the indebtedness to him, "and also the several amounts due or owing on the claims in the several attachment suits, including the costs in said actions." That defendant was entitled to these credits, there is no dispute. Plaintiff conceded that he was to pay these attachment claims, while defendant contends that he was to pay these and other indebtedness to the amount received by him. In the nineteenth instruction the jury was told that it was to allow the defendant credit as against the amount received from the real estate for "all moneys, disbursements, and advancements which you find the defendant made as agreed by him to be made as to the consideration for the conveyance." If the jury found the agreement to be as claimed by the plaintiff, it was only the attachment claims that were to be allowed, but if as claimed by the defendant, then, under this instruction, they were to allow him for all claims paid as agreed to be paid, which would include the Bunton claim. This instruction 19 is identical, in the language quoted, with one asked by the appellant. Now, it is true that in the twenty-first instruction the attachment claims are referred to, and no mention made of the Bunton claim; but, in view of said nineteenth instruction, we think the jury must have understood that it might allow the Bunton claim unless they found that the agreement was as to the attachment claims only.

V. The jury found specially that the attachment was wrongfully, but not maliciously, sued out, and allowed plaintiff one hundred dollars actual damages and no exemplary damages. Appellant contends that the finding that the attachment was wrongfully sued out, and that plaintiff is entitled to one hundred dollars actual damages, is not supported by the evidence. We think the findings are fully warranted by the evidence, and the same is true as to the alleged settlement. What we have said disposes of all the material questions discussed, and leads to the conclusion that the judgment of the district court is correct, and it is therefore AFFIRMED.

C. F. McLACHLAN V. THE INCORPORATED TOWN OF GRAY
et al., Appellants.

Injunction: VACATION OF HIGHWAY: *Remedy of abutting owner.*

An owner abutting on a highway, which a town proposes to vacate, no part of the highway lying on his land, cannot enjoin the vacation on the claim that his right of access will be interfered with and he otherwise seriously injured, as he has a plain, speedy, adequate remedy at law by *certiorari*. No question of fraud or bad faith is involved and the right to damages is not decided.

Appeal: WRONG FORUM: *New objections on appeal.* A defendant urging in the trial court that plaintiff was not entitled to an injunction may, on appeal, first urge that plaintiff had an adequate remedy at law. Such objection, in effect, urges a want of power rather than a mistake as to *forum*.

Appeal from Audubon District Court.—HON. W. R. GREEN, Judge.

SATURDAY, APRIL 9, 1898.

ACTION in equity to restrain the vacation of a highway within the limits of the incorporated town of Gray. There was a hearing on the merits, and a decree in favor of the plaintiff. The defendants appeal.—*Reversed.*

105	259
109	280

105	259
112	371
112	787

105	259
113	621
4113	630

105	259
115	736

105	259
117	619

105	259
119	270
119	431

105	259
126	390

105	259
124	54

105	259
136	579

H. F. Andrews for appellants.

Wonn & Noon and *Theo. F. Myers* for appellee.

WATERMAN, J.—The petition alleges that plaintiff owns a tract of land along the south side of which runs a highway leading into the town of Gray; that he has erected expensive buildings, and made improvements upon that portion of his land abutting on said highway; that part of the highway is included within the limits of the incorporated town of Gray; that the council of said town, having provided another highway, but one that is not convenient for plaintiff's use, passed an ordinance vacating the part of the highway that is within the limits of the town. The plaintiff claims that he is thereby deprived of convenient access to his land and from his land to the town, all to his great injury
1 and damage. No part of the highway is on plaintiff's land. The defense is, in substance, that the town had good reason for vacating the highway. There was a temporary injunction, and upon a hearing plaintiff had a decree perpetually enjoining defendants from vacating said highway. The town, the members of the council, and the street commissioner are made defendants herein.

II. Appellants contend that plaintiff is entitled to no such relief in equity, and this, we think is so. It is well established that courts of equity will not afford a party aid to protect his rights if he has a plain, speedy, and adequate remedy at law. The remedy here should have been sought through proceedings by *certiorari*. *Rockwell v. Bowers*, 88 Iowa, 88; *Stubenrauch v. Neynesch*, 54 Iowa, 567; 2 Dillon, *Municipal Corporation*, sections 611, 925. In the opinion of the trial
2 judge, which is set out in the abstract, it is said: "No objection is made in this case to the form of this action, and, if there are any valid objections

thereto, I think they are now waived." Appellee urges the claim of waiver here. We do not think it good. Defendants have from the first most strenuously insisted that plaintiff was not entitled to an injunction. We do not think they are precluded from giving a reason in support of that contention in this court merely because they did not assign it in the court below. What they set up is not a new claim, but rather an additional argument in favor of a claim that they have insisted on from the outset. *Bond v. Railway Co.*, 67 Iowa, 712. In each of the first cited cases, which were equitable actions for injunctions, the point was ruled by this court after a trial on the merits below. If the objection here was to the forum, and not to plaintiff's right, the failure to make a motion to transfer to the proper docket would be a waiver. *Corey v. Sherman*, 96 Iowa, 114, and cases cited. So, too, if the facts as alleged were proper in kind, but merely insufficient, so that the want might have been supplied, a failure to demur would have precluded the objection of insufficiency now being raised. But the objection here goes much further than in either of the instances mentioned. Unlike the case of *Corey v. Sherman*, *supra*, it is obvious that this proceeding could not have been maintained in any forum; that this is not a case in which some facts are wanting to warrant the court's action. The claim made here, and justly so, is that no state of facts would warrant the district court in interfering with properly conducted proceedings by a municipality to vacate a street. An absolute want of power is urged, and this may be set up for the first time in this court. *Groves v. Richmond*, 53 Iowa, 570; *Manufacturing Co. v. Harrington*, 53 Iowa, 380. The power to vacate streets and highways is expressly given to cities and towns. Code 1873, section 464. *Gray v. Land Co.*, 26 Iowa, 387; *Barr v. Oska-loosa*, 45 Iowa, 275; *City of Marshalltown v. Forney*, 61

Iowa, 578; *Dempsey v. City of Burlington*, 66 Iowa, 687; *Williams v. Carey*, 73 Iowa, 194. The only right that a property owner has under issues like those at bar is to insist that the proceedings be regularly conducted, and, for this, the proper method is by *certiorari*]

In view of the conflicting language of some of our decisions, it may be well to say something further as to the authority of the courts in cases of this character. We understand the general assembly has plenary power over streets, and may vacate or discontinue the public easement in them, and may invest municipal corporations with this authority. 2 Dillon, *Municipal Corporations*, section 666, and cases cited; *Gray v. Land Co.*, *supra*; *Paul v. Carver*, 24 Pa. St., 207; *Kimball v. Kenosha*, 4 Wis. 321. In this state, a distinction, though not so expressly declared, seems to have been taken between streets and public grounds like squares. We refer to what is said in *Warren v. Mayor of Lyons City*, 22 Iowa, 351. The statements in this opinion seem to be questioned by Judge Dillon. 2 Dillon, *Municipal Corporations*, section 651, and note. But whether there is any well-founded distinction or not between streets and other dedicated grounds, it is established in this state, as elsewhere, that under authority from the general assembly the municipalities have power to vacate streets. In some states, where the matter is regulated by statute, equity will interfere. But in those jurisdictions where the statutes are similar to ours the parties are left to their remedy at law. *Lindsay v. City of Omaha*, 30 Neb. 312 (46 N. W. Rep. 627). A careful examination of the cases in this state usually relied upon to sustain the jurisdiction of equity, to control the acts of municipalities in matters of this kind, will disclose that they are not in point. In *Warren v. Mayor of Lyons City*, *supra*, and in *Cook v. Burlington*, 30 Iowa, 94, the question as to the right of the city to vacate

the grounds in dispute was not in issue. The only matter involved was whether the city had a right to dispose of the property by lease or sale. *City of Dubuque v. Maloney*, 9 Iowa, 450, was an action for damages by the city against a lot owner on account of an injury done the street. *Yost v. Leonard*, 34 Iowa, 9, and *Fisher v. Beard*, 32 Iowa, 346, were both cases in which it was sought to restrain an individual who had platted an addition, and sold lots abutting upon streets shown on the plat, from vacating the streets without the consent of the lot owners. In *Moffit v. Brainard*, 92 Iowa, 122, the gist of the complaint was a want of power in the board of supervisors. In attempting to vacate a highway, the board had not taken the necessary steps to acquire jurisdiction. The action was brought to enjoin the obstruction of the highway. In such a case equity always has jurisdiction. Of like character with *Moffit v. Brainard* are the various cases cited in that opinion. The rule, as we understand it, is that, whenever a want of power is urged a court of equity may act; when the power is conceded, but the manner of its exercise is sought to be controlled, the remedy is at law, through proceedings by *certiorari*. If it should be said that this power may be abused if not held subject to control by the courts, we might respond, as the court did in *Paul v. Carver*, *supra*: "It is true, there is much property in the commonwealth, whose principal value would be taken away by closing the avenues which lead to it, and we are warned that, if we do not declare it unconstitutional, an act may be passed to vacate Chestnut street. If the possible abuse of power were sufficient to prove that the legislature cannot have it, then this would also prove that it does not exist at all; and this would bring us to the absurd conclusion that there is no authority anywhere in the state to vacate a useless road, and substitute a better one in its place." What we

have said must be understood as applying only to cases like that under consideration. We do not mean
 3 to hold that a charge of fraud or bad faith on the part of the municipal authorities might not make a case of equitable cognizance. Nor do we wish it thought that any opinion is here expressed as to the right of an owner to damages, whose property abuts immediately upon the discontinued portion of a highway. Neither of these questions is in this case; and upon the latter, in view of a former decision of this court, we think some conflict of authority may be found. The decree of the trial court will be REVERSED.

SIMONSON BROTHERS MANUFACTURING COMPANY, Appellant, v. CITIZENS STATE BANK OF GOLDFIELD *et al.*

Mechanic's Lien: ACTIONS IN REM. An action to foreclose a mechanic's lien, where no personal judgment is asked, is a proceeding *in rem*.

NOTICE BY PUBLICATION: *Adjudication upon.* Code, 1873, section 2618, subdivision 5, provides that jurisdiction may be obtained of a defendant on service by publication "in actions brought against
 1 nonresidents of this state, or a foreign corporation, having in this
 3 state property or debts owing to such defendant, sought to be taken by any of the provisional remedies, or to be appropriated in any way." *Held*, that a subcontractor who holds an open, unliquidated account against the principal contractor may bring an action against the owner to foreclose his lien, and, in the same action have adjudicated the amount of his claim against the principal contractor who is served, only by publication, with notice of the action.

RIGHT OF SUBCONTRACTOR. Where the contract between the principal contractor and an owner was that the owner was to pay for the work and material as the building progressed, and the owner
 5 knew that a subcontractor was furnishing material for the building, and that he was not being paid by the principal contractor, if the owner settles with the principal contractor who files his statement of lien in due time, without holding back enough to pay the subcontractor, the latter will be entitled to his lien therefor.

BURDEN OF PROOF. A subcontractor seeking to foreclose a mechanic's lien has the burden of proving what was due the principal contractor at the commencement of such subcontractor's account, or at the time the notice of lien was served.

MISTAKE IN STATEMENT. Where the statement for a mechanic's lien, 6 by an honest mistake, which harmed no one, was for a greater sum than was due, it does not defeat the lien.

Appeal from Wright District Court.—HON. B. P. BIRD-SALL, Judge.

SATURDAY, APRIL 9, 1898.

ACTION to establish and foreclose a mechanics' lien.
Trial to court. Decree for defendant. Plaintiff appeals.
—*Reversed.*

A. Ueland and Peterson & Humphrey for appellant.

Nagle & Nagle for appellee.

WATERMAN, J.—The Citizens' State Bank entered into a written contract with one Lofgren, who is also a defendant herein, whereby he was to construct for it, in Goldfield, a building for banking purposes. Lofgren procured of plaintiff, whose place of business is in Minneapolis, Minn., sash, doors, and woodwork for said building, to the amount, as claimed by plaintiff, of three hundred and thirty-nine dollars and eighty-two cents, balance due. Lofgren left the state, without settling with plaintiff. The latter filed a statement for a mechanic's lien on said premises, and brings this 1 action to foreclose the same. Lofgren was served with notice by publication, and made default in the court below. This is a sufficient statement of the facts to give an understanding of the first point presented for determination.

II. Plaintiff's claim is on an open account, and the first question submitted is whether a subcontractor, who

holds an open, unliquidated account against the principal contractor, may bring an action against the owner to foreclose his lien, and in the same action adjudicate the amount of his claim against the principal contractor, who is served, only by publication, with notice of the action. That the subcontractor cannot foreclose his lien until the amount due him from the principal contractor is settled or adjudicated may be conceded. *Vreeland v. Ellsworth*, 71 Iowa, 347; *Kerns v. Flynn*, 51 Mich. 573 (17 N. W. Rep. 62); Phillips, *Mechanics' Liens*, section 397. The contention of appellee is that plaintiff's claim against Lofgren was purely personal, and that there can be no adjudication against him until the court has jurisdiction of his person, and that this cannot be acquired on service by publication. It would, indeed, be a singular defect in our law if a subcontractor, who has a right to a mechanic's lien, can be prevented from enforcing it by the absconding of the principal contractor. We have always regarded an action to enforce a mechanic's lien as in the nature of a foreclosure of a mortgage. Where no personal

2 judgment is asked, it is strictly a proceeding *in rem*. Phillips, *Mechanics' Liens*, section 305, 2 Black, Judgment, section 810. Our statute provides that jurisdiction may be obtained of a defendant, on service by publication, "in actions brought against a

3 non-resident of this state, or a foreign corporation, having in this state property or debts owing to such defendant sought to be taken by any of the provisional remedies, or to be appropriated in any way." Code 1873, section 2618, subd. 5. We cannot perceive why, under this provision, a plaintiff's right, as against his debtor cannot be as fully adjudicated in the foreclosure of a mechanic's lien as it could in an attachment suit, or in the foreclosure of a mortgage. We are not impressed with the reasoning of the two cases cited

by appellee, and which were decided by an intermediate court of Colorado. In *Castleberry v. Johnston*, 92 Ga. 499 (17 S. E. Rep. 772), also in appellee's brief, the intimation is expressly against the claim made here. The case is reported without an opinion, but the syllabus is by the court. While it is held that, when the principal contractor has absconded, an action to foreclose, based on an unliquidated account, cannot be maintained by a subcontractor unless the former is served with notice, it is said also that the notice may be by publication. But authorities scarcely seem necessary. The action here is but a method of condemning plaintiff's use money, in the possession of the bank, that belongs to Lofgren. This can certainly be done, as against a non-resident upon whom personal service cannot be obtained.

III. On November 12, 1895, the day of filing its statement for a lien, which was within thirty days of the time of delivering the last material under its contract, plaintiff served on the bank written notice of its claim. It is not denied that prior to this time the bank had knowledge of the fact that Lofgren was purchasing material from plaintiff. Defendant claims to have paid Lofgren in full. The burden was upon plaintiff
4 to prove what was due Lofgren from the bank at the time its account commenced, or at the time of service of its notice. *Martin v. Morgan*, 64 Iowa, 270. The evidence is meager and unsatisfactory, both as to the terms of the contract, and the manner in which it was performed. The answer of the bank states
5 that under the contract with Lofgren it was required to pay for the work and material as the building progressed. As we have remarked, it knew plaintiff was furnishing material for the building. We might go further, and find that it knew plaintiff was not being paid by Lofgren; for it refused to cash a check

drawn on it, which plaintiff had received from Lofgren on account. The circumstances all indicate that, if the bank had acted upon its knowledge of plaintiff's rights, it could have held back from what was due Lofgren enough to pay plaintiff's entire claim. This it should have done. It had no right as against plaintiff, under the circumstances, to settle with Lofgren in full. *Gilchrist v. Anderson*, 59 Iowa, 275; *Fay v. Orison*, 60 Iowa, 136; *Andrews v. Burdick*, 62 Iowa, 718; *Lumber Co. v. Woodside*, 71 Iowa, 359; *Hug v. Hintrager*, 80 Iowa, 359; *Othmer v. Clifton*, 69 Iowa, 656; *Merritt v. Hopkins*, 96 Iowa, 652. The more recent case of *Epeneter v. Montgomery County*, 98 Iowa, 159, does not alter the rule announced in these cases. The payments under the contract in that case were to be made at fixed times, and the holding is that the owner may pay at such times, regardless of his knowledge of subcontractors and their claims, so long as a lien is not filed, and he served with notice thereof. The rule so announced was based upon the particular wording of the contract and of the statute under which the case arose. Acts Twentieth General Assembly, chapter 179.

IV. There is no merit in appellee's claim that the lien should not be allowed because the statement, as filed, was for a greater sum than was due. This was an honest mistake, for which plaintiff should not be made to suffer. It harmed no one. *Lumber Co. v. Miller*, 98 Iowa, 468, and *Chase v. Mining Co.*, 90 Iowa 25.

V. The amount due, and for which plaintiff is entitled to a lien, is two hundred and ninety-seven dollars and seventeen cents. The judgment of the district court is reversed, and the case will be remanded for a decree in harmony with this opinion, or the plaintiff may, at its option, have a decree in this court.—
REVERSED.

MARY KUBIC V. G. A. ZEMKE, Appellant.

105	208
115	884
105	289
128	482

Directed Verdict. A verdict cannot properly be directed for plaintiff unless the court is able to say, after giving defendant the benefit
2 of facts as to which there is a substantial conflict, that a finding for him would not be supported by the evidence.

RULE APPLIED. Plaintiff sued for necessities furnished defendant's son, a minor. The son had lived with defendant only four and
1 one-half months, when he was fifteen years old, and then worked for defendant under a contract to receive wages, and left because he did not want to stay, to which the father consented. *Held*, that it was error to direct a verdict for plaintiff.

BURDEN OF PROOF. Defendant in an action for board, care, and medicine furnished to his minor son, has the burden of proving the
3 emancipation of his son, where he relies thereon as a defense.

Appeal from Floyd District Court.—HON. J. F. CLYDE, Judge.

SATURDAY, APRIL 9, 1898.

HENRY Zemke is a son of the defendant. Defendant was married in Milwaukee in 1871 or 1872, and went to live in Nora Springs, Iowa; and after two or three months, there was a separation, and his wife went to Milwaukee, Wis., where Henry was born October 11, 1873. Within two or three years, defendant was divorced from his wife, and married
1 again. When Henry was fifteen years old, he visited his father at Nora Springs, when, as he says, his father desired him to remain and work for him for ten dollars per month, and board and clothes, which offer he declined, and returned to Milwaukee. The following year he accepted his father's offer to work for ten dollars per month, and board and clothes, and go to school in the winter. It is a fact that he

did work for his father about four and one-half months, when he left, and went to Chicago, where he obtained work; and about December 1, 1891, he commenced boarding with the plaintiff. In February, 1892, he was taken sick, and so continued till August of that year, during most of which time he was in bed; and the plaintiff furnished him medicine, board and care, for the payment of which Henry had no means, and the plaintiff has not been paid. This action is to recover from defendant, as the father of Henry, for the value of the expenditures and services. The defendant's answer recites the facts as to Henry always being separated from him, except for the four and one-half months, during which time he employed Henry for wages, which he paid, and that after such service Henry refused to continue with him longer, and claimed the right to go and work for whom, and where, he pleased, and that he (defendant) consented thereto; and, as a conclusion, it is said that Henry was fully emancipated. The evidence was presented to a jury, at the close of which the court denied a motion by defendant to direct a verdict in his favor, and thereupon the court, on its own motion, directed a verdict for the plaintiff, and from a judgment thereon the defendant appealed.—*Reversed.*

Cliggitt & Rule for appellant.

H. J. Fitzgerald for appellee.

GRANGER, J.—The controlling issue in the case is that as to emancipation. The facts are practically beyond dispute, except as to what occurred when Henry worked for his father in 1891. Both Henry and his father were witnesses, and their testimony is in conflict as to important details bearing on the question of emancipation. There is no question but that he

worked under a contract for wages, but Henry says he left the employment because his father refused to pay him; saying to Henry that he was his son, that he did not owe him anything, and that he had to work for him till he was twenty-one. The testimony of the defendant is directly opposed to this; he saying that he paid seventy-three dollars for five months' and twenty days' work; that Henry left without giving any reason for doing so, except that he did not want to stay. The testimony of each is more in detail than we have stated, but our purpose is to show the condition of the evidence as to the controlling issue, so as to determine the correctness of the court's action in taking the case from the jury. To justify the action

2 of the court, we must be able to say, after giving to defendant the benefit of facts as to which there is a substantial conflict, that a finding for defendant would not have had support in the evidence. The question of emancipation turns on the understanding of defendant and Henry. It is the defendant

3 who pleads emancipation, and he must establish it. It is not to be presumed. Schouler, Domestic Relations (4th Ed.), section 267a. A mutual understanding is sufficient to constitute emancipation, and it is not required to be expressed. It may arise by implication from the acts and conduct of the parties. *Id.* If, as appears by defendant's testimony, Henry claimed the right to control his time and earnings, and defendant assented thereto, and they acted with that understanding, it was an emancipation. If, on the other hand, defendant claimed the right to Henry's services during his minority, so long as he claimed that right, whether he exercised the right to have them or not, there could have been no emancipation so as to free him from the obligation the law creates between a father and his minor son for support. We have no case

in this state directly in point on the question we are considering. See *Everett v. Sherfey*, 1 Iowa, 358; *Dawson v. Dawson*, 12 Iowa, 512; *Johnson v. Barnes*, 69 Iowa, 641; *Bener v. Edgington*, 76 Iowa, 105; *Porter v. Powell*, 79 Iowa, 151; *Cooper v. McNamara*, 92 Iowa, 243. These cases bear more or less directly on questions involved, and show what follows complete emancipation. We are clearly of the opinion that it was error for the court to direct a verdict for plaintiff, under the state of the evidence, and we may add that we think it would have been as clearly so to have directed one for the defendant. We think the question of emancipation should have been submitted to the jury, under an instruction as to what would constitute emancipation. The judgment is REVERSED.

REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF
THE STATE OF IOWA

AT
DES MOINES, MAY TERM, A. D. 1898,
AND IN THE FIFTY-SECOND YEAR OF THE STATE.

WESLEY M. JOHNSON V. THE DES MOINES LIFE INSURANCE COMPANY, Appellant.

Insurance: SETTING OUT TRUE COPY OF APPLICATION. Under McClain's Code, section 1788, providing that a true copy of any
1 application or representation of the insured which is referred to in the policy shall be indorsed thereon, or attached thereto, otherwise the insurer shall be precluded from pleading it or the falsity thereof, such copy need not be a *fac simile*, but must be so exact that on comparison it may be said to be a true copy, without resorting to construction.

RULE APPLIED. The substitution in a purported copy of an application for life insurance, of "children" for "mother," as a term of relationship, the omission of a question as to the amount of other
3 insurance in the same company, the consolidation of several questions into one, the setting out of answers to questions not given in the original and the insertion of questions as to the details of general questions in the original, are such variations as to require

105	273
115	492
105	273
1139	142
139	374
105	273
144	231

construction; and hence it is not a true copy, within McClain's Code, section 1733, requiring true copies of such applications to be endorsed or attached to a policy of which they are a part.

REPORT OF MEDICAL EXAMINER. A special report of a medical examiner is not a part of the "application or representation of the assured," within McClain's Code, section 1733, requiring such to be endorsed on or attached to a life insurance policy, of which it is made a part.

Appeal from Lee District Court.—HON. H. BANK, JR.,
Judge.

TUESDAY, MAY 10, 1898.

ACTION to recover upon a policy of life insurance issued by the defendant on the life of L. May Johnson, upon her application in writing therefor. Defendant answered, alleging among other things that certain statements made in said application as true, and upon which defendant relied, were false, fraudulent, and untrue, and known to said applicant, at the time they were made, to be false, fraudulent, and untrue. On the trial the defendant, to prove the statements made, offered said application in evidence, to which the plaintiff objected "because no copy of the application is attached to the policy, as provided by section 1733 of McClain's Code; the copy purporting to be a copy of the application in question, which is attached to the policy, being only a copy of a portion of the application." This objection was sustained, and the defendant having rested, the court, on motion of the plaintiff, directed the jury to find for the plaintiff in the amount claimed, and entered judgment accordingly. Defendant appeals.—*Affirmed.*

Cummins, Hewitt & Wright, A. J. McCrary and A. H. Evans for appellant.

J. C. Davis for appellee.

GIVEN, J.—I. Said section 1733 of McClain's Code is as follows: "All insurance companies or associations shall, upon the issue, or renewal of any policy, attach to such policy, or endorse thereon, a true copy of any application or representation of the assured, which, by the terms of such policy are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy. The omission so to do shall not render the policy invalid, but if any company or association neglects to comply with the requirements of this section, it shall forever be precluded from pleading, alleging or proving such application or representation or any part thereof, or falsity thereof, in any action upon such policy, and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representation but may do so at his option." The application offered in evidence, and the purported copy thereof attached to the policy, are upon printed blanks, filled up in writing, and differing somewhat in form and words, as will be hereafter noticed. It appears that prior to the issuing of this policy the defendant changed the form of its blank applications, and printed the new form on the back of its policies. This application was made upon the old form, and the copy upon the new; hence the differences we are called upon to consider.

The first contention is as to the meaning of the words "true copy," as used in said section. Defendant contends that a substantial copy is all that is required, while the plaintiff insists that it must
1 be exact, accurate, and not merely a substantial copy. In determining this contention, we must consider the purpose of the statute, as well as the

meaning of the words. An evident purpose of this statute is that when the application is made a part of the contract, as in this case, a true copy must be attached to the policy, so that the writings composing the contract may all appear together, and that the insured may be in possession of the evidence of what his contract is. With this purpose in mind, we inquire what is intended by the words "true copy." It is said that nothing is added by the word "true"; that, to be a copy, it must be a true copy; and yet this discussion recognizes that a copy may be only substantial, or that it may be exact, accurate, or a true likeness of the original. The word "true" surely emphasizes the requirement. The following definitions found in *Webster's International Dictionary* will aid in solving this question: "Copy. To make a copy or copies of; to write, print, engrave, or paint after an original; to duplicate; to reproduce; to transcribe; as to copy a manuscript, inscription, design, painting," etc. "True, (1) Conformable to fact; in accordance with the actual state of things; correct; not false, erroneous, inaccurate, or the like; as a true relation or narration; a true history. A declaration is true when it states the facts. (2) Right, to precision; conformable to a rule or pattern; exact; accurate; as a true copy; a true likeness of the original." "Substantial. (1) Belonging to substance; actually existing; real; as substantial life. (2) Not seeming or imaginary; not elusive; real; solid; true; veritable." "Comparison. (1) The act of comparing; an examination of two or more objects with the view of discovering the resemblance or differences; relative estimate." It is by comparison of these two documents that we have ascertained the differences between them, while by construction we determine whether the differences are such as that the purported copy is or is not a substantial copy of the original.

Construction is defined as: "(4) The Method of constructing, interpreting, or explaining a declaration or fact; an attributed sense or meaning; understanding; explanation; interpretation; sense." "Strictly, the term [construction] signifies determining the meaning and proper effect of language by a consideration of the subject-matter and attendant circumstances in connection with the words employed." In view of these definitions, and the purpose of the statute, we think it is clear that the statute contemplates more than a merely substantial copy, and yet not a true likeness or *fac simile*. It must be so exact and accurate as that, upon comparison, it can be said to be a true copy, without resorting to construction. If, upon comparison, it may be said that the copy is conformable to the facts, and in accordance with the actual state of things appearing in the original, then it may be said to be a true copy; but if the differences are such that construction must be resorted to, to determine whether the meaning and proper effect of the copy are the same as the original, then it cannot be said to be a true copy. Appellee cites *Goodwin v. Association*, 97 Iowa, 226, in which we held that a true copy was not attached to the policy. In that case the examiner's report was not included in the copy, and the places to which notices and premiums were to be addressed were incorrectly stated in the copy, and some of the statements made by the assured with reference to his past afflictions were not carried out in the copy. Whether the examiner's report was a necessary part of a true copy was not considered in the case, and the conclusion reached was because of the other omissions named. The

2 examiner's report is not part of the "application or representation of the assured," and is not required to be included in the copy. The same is true as to the notes of instructions given for making the

application and answers, and as to indorsements upon the back of the application made for mere convenience. Appellee's counsel, following the abstract, we presume, have pointed out differences which, upon comparison, we find do not exist, as that in the date in one "A. D." appears, while in the other it is omitted. These contentions will not be further noticed.

As we hold that Form C, the special report of the medical examiner, is not a part of the "application or representation of the assured," its absence from the

copy need not be further considered. Our
3 inquiries are limited to the differences in Forms

A and B in the original and in the copy, and first in Form A. Form A reads, "L. May Jonhson, jointly with," etc., while in the copy the words "jointly with" are erased. In designating the beneficiaries, the original reads: "Harold L., Sales C., Loa B., & Merle Jonhson, children, equally. Relationship, mother." In the copy, following the word "Relationship," is the word "children." The original reads: "Are you now insured in the Des Moines Life Association? If so, how much? No." The copy reads: "Are you now insured in the Des Moines Life Association, in this or any other state? No." These are the only differences that we discover between the copy of Form A and the original. Turning to Form B., we find that the original has five questions and answers, as follows: "(a) Are you in good health? Yes. (b) Have you now any disorder or disease? If so, what? No. (c) Have you ever had any illness or local disease? Give full particulars. No. (d) Have you ever had any personal injury or accident? Give full particulars. No. (e) Did you ever have any surgical operation? Give full particulars. No?" The copy is as follows: "(a) Are you in good health? Yes. (b) Have you now any disorder or disease? If so, what? No. (c) Have you

ever had any illness, local disease, or any personal injury, accident, or been subject to any surgical operation? If yes, state nature, date, duration, severity, and sequel. No." In the original the question, "Have you had rheumatism?" is followed by these further questions: "How many attacks, duration, in what years, was it inflammatory, parts affected, accompanied by cough, shortness of breath, pain in chest, or palpitation of heart?" Each of these questions is followed by a dash, and so appears in the copy, except that the word "No" is written opposite the first question. In the original to the question, "Are you ruptured?" no answer appears, while in the copy it is answered "No." In the original the fifty-two questions are answered in the negative, wherein the applicant is asked whether she had had any of the diseases named, while in the copy they number only fifty; three questions in the original being combined in one in the copy, namely, affection of liver, spleen, or kidneys. In all other respects they are identical, except as to the order in which the questions and answers appear. We have thus pointed out all the differences between the original and the copy, and, while it might be said that the copy is substantially correct, we think it cannot be said to be a true copy. The variations are such as to call for construction to uphold the copy, even as a substantial copy. We think there was no error in sustaining the objection to the offer of this copy in evidence, nor in instructing the jury to find for the plaintiff.—AFFIRMED.

C. E. CHILDS v. NICHOLAS MUCKLER, Appellant.

Alienating Wife's Affections: EVIDENCE. Evidence that the wife of plaintiff in an action for alienating her affections went on one or
4 more occasions to defendant's room and requested him to arrange the bandage on her arm which was injured, is admissible to show that she had an affection for defendant.

SAME Evidence that the wife of plaintiff in an action for alienating her affections took a ride at one time with defendant when plaintiff would have taken her if he had known she wanted to go, is admissible, as it bears on whether she went with defendant from choice or necessity.

INSTRUCTIONS. An instruction in an action for alienating the affections of plaintiff's wife that it was defendant's duty to refrain so far as he reasonably could, from any act which he knew would tend to awaken an affection for him on the part of plaintiff's wife is not objectionable as intimating that he should have known that common courtesy or civility would have that effect

Opinion Evidence. Opinion evidence is admissible in an action for alienating the affection of plaintiff's wife as to whether or not she was "nice looking."

Trial: INSTRUCTIONS. An instruction is properly refused where substantially the same thought has been expressed in the charge given.

Evidence: REVIEW. The admission of immaterial evidence is not ground for reversal unless it reasonably appear that it was prejudicial to the complaining party.

HARMLESS ERROR Error if any in admitting opinion evidence that the wife of plaintiff in an action for alienating her affections was a "nice looking woman" was harmless to defendant where she was present as a witness and gave testimony in the case, thus permitting the jury in a proper way to see how she looked.

Verdict: REVIEW. A verdict on conflicting evidence, and approved by the trial judge, will not be disturbed on appeal, though it might well have been the other way.

Appeal from Poweshiek District Court.—HON. D. RYAN, Judge.

TUESDAY, MAY 10, 1898.

THIS is an action to recover damages for the alienation by defendant of the affections of plaintiff's wife. There was a verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

Haines & Lyman for appellant.

D. W. Norris and *W. R. Lewis* for appellee.

WATERMAN, J.—A great many of the errors complained of relate to rulings upon evidence. It would take much time and space to set them out in detail, and would be of no particular benefit to the profession. We will give one or two instances to show the character of these objections. The first error assigned is the overruling of an objection interposed by defendant to an interrogatory propounded to plaintiff while he was upon the witness stand. Plaintiff had testified that at one

time his wife rode with defendant to Grinnell.

1 He was then asked: "Were you ready and willing to take her? (Objected to as incompetent, irrelevant, and immaterial. Objection overruled.)" It would scarcely seem a very material matter, or as likely to have prejudiced defendant, if the answer was erroneously admitted. But we cannot perceive that there was any error in the ruling. It was proper to show whether defendant's wife went with Muckler through choice or necessity. It is true that the record does not disclose that the husband's readiness was known to the wife, but the answer of the witness does indicate that the wife voluntarily went with Muckler, when she had no occasion to do so, and that she might have known her husband would take her had she cared to inquire. Her feeling towards Muckler was one of the essential elements of plaintiff's case. Another objec-

tion, which we select at random, was to this question:
2 "Mrs. Childs is a nice looking woman, isn't she?" This was said to be immaterial and calling for the opinion of the witness. The question related to plaintiff's wife. If the fact was admissible, we are inclined to think that it was one of those matters upon which opinion evidence is receivable, from the very necessities of the case. *State v. Moelchen*, 53 Iowa, 310; *State v. Shelton*, 64 Iowa, 333; *Yahn v. City of Ottumwa*, 60 Iowa, 429; Rogers, Expert Testimony, page 5. No

description of the woman would have enabled the jury to determine whether or not her appearance was prepossessing. But it is said the evidence was not material, and therefore should not have been admitted. There is some foundation for this claim. It is well, however, to remember that the admission of immaterial evidence will not constitute reversible error, unless it appears that it might reasonably be considered in some way prejudicial. In this instance it affirmatively

3 appears that defendant could not have been injured by the answer given. Mrs. Childs was present as a witness and gave testimony in the case. Her appearance was thus made manifest to the jury in a legitimate and proper way. What was said about it could not possibly have affected the verdict.

4 Testimony was received over defendant's objection, as to the conduct of Mrs. Childs towards defendant; for instance, that she went on one or more occasions to his room, and requested him to arrange a bandage on her arm, which was injured. It is said that defendant was in no way responsible for what she did in this respect, unless he in some manner induced her to so act. This is true. But it was a part of plaintiff's case to show that his wife had an affection for Muckler. This could only be done by disclosing her conduct with him. This evidence was admissible, although it was necessary, in order to hold defendant in damages, to show, further, that he was wilfully responsible for the wife's feeling for him. The examples we have set out illustrate quite fairly the character of the exceptions to the testimony. We have given the case careful attention, and fail to find any prejudicial error in the various rulings on the evidence, of which complaint is made.

II. Exception is taken by defendant to the sixth instruction given the jury. It is not necessary to quote

it. It is enough to say that we do not deem it open to the criticism made by counsel. The jury is told
5 that it was defendant's duty to refrain, so far as he reasonably could, from any act that he knew would have a tendency to awaken an affection on the part of Mrs. Childs for him. It is not, as appellant claims, intimated that he should have known that common courtesy or civility would have this effect.

III. Defendant asked an instruction embodying a correct rule of law, and which the court declined
6 to give. There was no error in this, however, for substantially the same thought was expressed in one paragraph of the charge as given.

IV. It is also urged that the verdict is not sustained by the evidence. The testimony is not altogether satisfactory. We do not hesitate to say that, taking all the facts and circumstances into consideration, it seems to us, from reading the case, that the verdict might well have been in defendant's favor. But more than this is
necessary to warrant us in interfering on appeal.

7 Many of the facts and circumstances relied upon by plaintiff are not denied by defendant; the contention on his part being that ~~these~~ acts were mere courtesies, shown without wrong intent by him. It was peculiarly the province of the jury to give a construction to his conduct. Then, too, it must be remembered that the trial court was much better able to judge of the character of the witnesses and the weight of their testimony than it is possible for us to do. It submitted the case to the jury, and, on the motion for a new trial refused to set the verdict aside. Under the well-known rules governing our action, we do not feel warranted in interfering on this ground. This, we believe, covers all objections made. The judgment below is AFFIRMED.

MARY L. SNYDER, *et al.*, Appellants, v. THE FORT MAD-
ISON STREET RAILWAY COMPANY.

Injunction: STREET RAILWAYS: *highways*. A mandatory injunction
1 to compel the removal of an electric light pole may be granted
3 when the pole is placed in front of the plaintiff's property without
4 necessity therefor, for the purpose of annoying him and to injure
and depreciate the value of his property, and where its placing
causes serious injury.

EMINENT DOMAIN. Poles of an electric railway, if properly placed, do
2 not give ground of complaint to an abutting owner, whether he
owns the fee of the street or not.

SAME. Poles of an electric railway must not be so placed as to inter-
5 fere unnecessarily with the right of abutting owners to use and
enjoy their property.

DEEMER, C. J. and WATERMAN, J., dissent.

Appeal from Lee District Court.—HON. H. BANK,
Judge.

TUESDAY, MAY 10, 1898.

ACTION in equity to enjoin the maintaining of a
trolley pole in front of the dwelling house of the plain-
tiffs. A demurrer to the petition was sustained, and
judgment was rendered in favor of the defendant for
costs. The plaintiffs appeal.—*Reversed*.

T. B. Snyder for appellants.

J. D. M. Hamilton for appellee.

ROBINSON, J.—The material facts alleged in the
petition, and admitted by the demurrer, are as follows:
The plaintiffs have owned and occupied as a home-
stead, since the first day of March, 1892, part of a lot
and a dwelling house thereon situated on Broadway

street, in the city of Ft. Madison. The lot is bounded on the west by that street, and the house fronts thereon, and on a public park, from which it is separated by the street. The streets, avenues, parks, and lots of the city were laid out and platted under and by virtue of an act of congress approved July 2, 1836, and an act amendatory thereof approved March 3, 1837, by the government of the United States, from which the title of the plaintiffs was derived. The defendant is a corporation organized under the laws of this state, and is engaged in operating a street railway, which is laid along Broadway street, in front of the premises of the plaintiffs. In the summer of the year 1895, electricity was substituted for the animal power which had been previously used to operate the railway. The trolley system was adopted, and, to aid in supporting the trolley wire, a pole twenty or more feet in height was placed in front of the dwelling of the plaintiffs, in that side of the street which was next to their lot. The petition alleges

1 that the pole is an obstruction to the enjoyment by the plaintiffs of their homestead; that it is a nuisance; that there was no necessity for placing the pole where it is; that it could have been so placed that it would not have affected the plaintiffs seriously; that, before it was erected, the plaintiffs protested against its being placed where it now is, and since its erection have offered to pay to the defendant the cost of moving it to a point near the north line of their property, but that the offer was refused; and that they have been greatly damaged by the placing of the pole where it now is, and will sustain much damage in the future if it be not removed. The petition further states that the defendant has not caused the damage which the plaintiffs have suffered, and will suffer by reason of the erection of the pole, to be assessed, nor has it compensated them for such damage. The plaintiffs ask for a

mandatory injunction requiring the defendant to remove the pole from their property, and particularly from the front of their dwelling house; and they ask, further, that the defendant be perpetually enjoined from erecting or maintaining the pole in front of the dwelling, and for general equitable relief. The demurrer is based upon the ground that the petition does not state facts which entitle the plaintiffs to the relief they ask.

I. The acts of congress under which the town of Ft. Madison was platted are found on pages 962-964 of the Revision of 1860. Those acts were considered in the case of *City of Dubuque v. Maloney*, 9 Iowa, 450, where it was held that the fee of the streets of a city platted and dedicated by virtue of those acts was, subject to the public easement, vested in the owners of the adjoining lots, and that the city had no right to use the streets for any purpose different from that for which they were originally designed. The same principle was approved in *Cook v. City of Burlington*, 30 Iowa, 94. In *Williams v. Carey*, 73 Iowa, 196, a distinction between cases where the fee to streets is in the abutting property owners and where it is in the city, was noticed. It follows that the defendant in this case could not rightfully acquire from the city nor exercise rights in the street which were not authorized by the dedication of the streets, but are inconsistent with the easement granted to the public. Section 464 of the Code of 1873 gave to cities and towns power to authorize or forbid the location and laying down of tracks for street railways on all streets, alleys, and public places. See, also, *Damour v. Lyons City*, 44 Iowa, 276. It now appears to be settled that an ordinary surface street railway operated by animal power is not a new or additional burden upon the public easement in a street, but one which the right of the public to use the street authorizes for the purpose of

facilitating public travel. *Citizens' Coach Co. v. Camden Horse Co.*, 33 N. J. Eq. 267 (36 Am. St. Rep. 542); *Attorney General v. Metropolitan R. Co.*, 125 Mass. 515; *Hobart v. Railroad Co.*, 27 Wis., 194; *Texas & P. Ry. Co. v. Rosedale St. Ry. Co.*, 64 Tex. 80; *Elliott v. Railroad Co.*, 32 Conn. 579; *Carson v. Railroad Co.*, 35 Cal. 325; *Merrick v. Railroad Co.*, 118 N. C. 1081 (24 S. E. Rep. 667); *Cincinnati & S. G. Ave. St. Ry. Co. v. Village of Cumminsville*, 14 Ohio St. 523; *Brown v. Duplessis*, 14 La. Ann, 842; *Railroad Co. v. O'Daily*, 12 Ind. 551; *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.*, 156 Ill. Sup. 255 (40 N. E. Rep. 1008); *Jaynes v. Railway Co.* (Neb.) 74 N. W. Rep. 67; Booth Street Railway Law, section 83.

Streets are designed for public uses, among which are the construction and operation of street railways; and if they are so constructed and operated as not to affect prejudicially the rights of the public, nor to interfere with the proper use of the street by others, no burden not contemplated by the dedication of the street is placed upon it. In such cases the kind of power used in operating the railway is wholly immaterial. It is said, however, that the erection of trolley poles, and the placing of wires upon them, is a permanent obstruction of the street for the benefit of the street railway, which necessarily interferes with the proper use of the street by others. That poles and wires might be so erected and arranged as to have that effect is undoubtedly true, but the mere fact that the spaces they occupy cannot be used for other purposes does not show an improper use of the street. They are designed to aid in the rapid, convenient, and economical transportation of persons from place to place, and thus to facilitate the use of the street by the public for whom it was intended. It is true that some authorities hold that the erection and maintenance of poles in the streets do cast a burden

upon the street which it was not intended to bear. *Jaynes v. Railway Co.*, *supra*, and cases therein cited. But the greater weight of authority appears to sustain the conclusion which we reach. *Taggart v. Railway Co.*, 16 R. I. 669 (19 Atl. Rep. 326); *Halsey v. Railway Co.*, 47 N. J. Eq. 380 (20 Atl. Rep. 859); *Lockhart v. Railway Co.*, 139 Pa. St. 419 (21 Atl. Rep. 26); *Louisville Bagging Mfg. Co. v. Central Pass. Ry. Co.*, 95 Ky. 50 (23 S. W. Rep. 592); *Railway Co. v. Mills*, 85 Mich. 634 (48 N. W. Rep. 1007); *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.*, 156 Ill. Sup. 255 (40 N. E. Rep. 1008); *Cumberland Telegraph & Telephone Co. v. United Electric Ry. Co.*, 93 Tenn. Sup. 492 (29 S. W. Rep. 104); Crosswell Electricity, section 108, 109, 182, 183; Booth Street

2 Railway Law, section 83. It follows from what we have said that an abutting lot owner has no sufficient ground to complain of the erection and maintenance of street railway poles in the street in front of his premises if they are properly placed, and this is true whether he owns the fee of the street or not.

Our attention is called to section 1324 of the Code of 1873, as amended by chapter 104 of the Acts of the Nineteenth General Assembly, which relates to the erection of telegraph and telephone poles along the highways of the state, and to section 1325 of the Code of 1873, which provides for the payment of damages caused by setting poles in private grounds, but we do not find anything in these sections to conflict with what we have said. It has been held in some cases that the erection of telegraph and telephone poles in streets imposes a new burden, because they do not in any manner aid in the use of the street by the public; but, as no question of that character is involved here, we refrain from expressing any opinion in regard to it.

II. It is the duty of a street-railway company to so construct and operate its railway as not to interfere

unnecessarily with the right of abutting property owners to use and enjoy their property. *Cadle v. Railroad Co.*, 44 Iowa, 14; *Crosswell Electricity*, 85. A private individual may maintain an action for relief from injury to himself or his property if the injury be separate and distinct from that which affects the general public. *Churchill v. Water Co.*, 94 Iowa, 89. The petition in this case alleges, and the demurrer admits, that the plaintiffs have sustained serious injury from the placing and maintaining of the pole in its present location, and that the injury will continue if

3 the pole be not removed. To show this more clearly, we set out somewhat more fully than we have already done the substance of averments contained in the petition. In addition to the platting of the town, the location of the property in question, and the adoption by the defendant of the trolley system, the petition alleges that the plaintiffs have since the year 1892, owned and occupied as a homestead the premises described; that the defendant erected in that part of the street appurtenant to their property, and in front of their dwelling, a pole twenty or more feet in height, used in supporting its trolley wire, and similar poles at intervals on each side of the street; that the poles so erected were connected by cross wires to which the trolley wire was attached; that it was not necessary to place a pole in front of the plaintiff's dwelling house, nor on that part of the street appurtenant to their premises; that the pole on the opposite side of the street to which the one in question is attached is from four to six feet further north than is the one in question, and, had the latter been placed three feet further north than is the one to which it is attached, it would still have been in front of the plaintiff's lot, but not at a place where it would have damaged the plaintiff's premises to such an extent as to be complained of; that the pole in question

is a nuisance and an obstruction to the enjoyment by the plaintiffs of their premises and homestead; that it was placed where it is, not because of any necessity, but to annoy the plaintiffs, and to injure and depreciate the value of their property, and that it had had that effect; that, before it was placed where it is, the plaintiffs protested against its erection there, and, after its erection, offered to pay the defendant the cost of moving it to a point near the north line of their property, where they would not object to it, but that defendant declined to accept the offer; that the plaintiffs have been greatly damaged by the placing of the pole where it now is, and will continue to suffer such damage until it is removed; and that they have not been in any manner compensated for such damage. Some of the averments of the petition are immaterial, but we are required to determine whether a cause of action is stated in the petition. If it is, the immaterial matter and the statement of legal conclusions may be disregarded. Section 2646 of the Code of 1873 required the petition in a civil action to contain "a statement of the facts constituting the plaintiff's cause of action," and the petition was demurrable if the facts stated in the petition did not entitle the plaintiff to the relief demanded. Section 2648. It is well settled that, under these provisions, ultimate facts only, and not evidence of them, are to be stated in the petition. *De Lay v. Carney*, 100 Iowa, 687; *Robinson v. Berkey*, 100 Iowa, 136. In *Luse v. City of Des Moines*, 22 Iowa, 590, it was said of a statement in the petition that the defendant "fixed and established a grade for Second street, as it was lawfully authorized to do"; that it was an averment of an ultimate fact; and that it was not necessary for the petition to show how the grade was established. In *Brown v. Kingsley*, 38 Iowa, 220 (an action for seduction), it was said that the ultimate fact was the fact of seduction, and that it was not necessary

to state in the petition the "acts made use of to deceive and mislead," nor certain other facts, as they were merely evidence of the ultimate fact. In *Grinde v. Railroad Co.*, 42 Iowa, 376, a petition which alleged that the "defendant, by its agents and servants, did run and manage one of its engines in such a grossly negligent and careless manner that the same ran against and over" a cow of the plaintiff which had casually strayed upon the track of the defendant, was held to be sufficiently specific, and it was said: "It is not allowable to plead mere abstract conclusions of law, having no element of fact. They form no part of the allegations constituting a cause of action; but if they contain the elements also of a fact, construing the language in its ordinary meaning, then force and effect must be given to them as allegations of fact;" and that to plead more than the ultimate fact would be to plead the evidence, which is not allowable. See, also, *Byington v. Robertson*, 17 Iowa, 562; *O'Conner v. Railway Co.*, 83 Iowa, 105; *Winter v. Railway Co.*, 80 Iowa, 443. Section 2655 of the Code of 1873 provided that an answer might contain "a statement of any new matter constituting a defense." In *Kendig v. Marble*, 55 Iowa, 386, which arose under that provision, the foreclosure of a mortgage on account of a judgment rendered by confession was asked. The answer alleged "that the confession of judgment was adopted as a fraudulent device, and is such to aid the plaintiff in evading the statute against usury, the plaintiff well knowing that the contract was usurious; that this defendant believed, at the time of the execution of the same, it was only for the amount due, without usury, as before stated." It was held by this court that a sufficient defense was pleaded, and that if a conclusion of law, and not of fact, was set out, the answer should have been assailed by a motion for a more specific statement; that, "if it was sufficiently

explicit to enable the plaintiff to demur to it, there can be no doubt that it was fully understood and disclosed the defense intended to be made. This was all that could have been required upon the consideration of the demurrer."

The petition in this case states that the pole in question was placed in front of the property of the plaintiffs without necessity therefor, to annoy them, and to injure and depreciate the value of their
4 property; that it is an obstruction to the enjoyment by them of their property; that it has depreciated the value of that property, and caused great damage to the plaintiffs, and will continue to cause such depreciation and damage if not removed; and that they have not not been compensated for the damages received. Applying the rule of the statutes and authorities cited, we conclude that the statements of the petition are of ultimate facts, which show a cause of action, although it may be true that a motion for a more specific statement as to the manner and extent of the obstruction and its effect might have been required had it been asked. But the ultimate fact was the unnecessary obstruction of the use and enjoyment of the plaintiffs' property, to their substantial damage; and that the petition showed. We do not understand the appellee to question this if it be true that the pole in question may have been so placed and maintained as to give to the plaintiffs a right of action. If the plaintiffs can prove the averments of their petition, they might recover damages for the injuries sustained; but they are not compelled to resort to that remedy. If the location of the pole is not only injurious, but unnecessary, they may have recourse to this action for the removal of the pole. *Richards v. Holt*, 61 Iowa, 533; *Gribben v. Hansen*, 69 Iowa, 255; *Harbach v. Railway Co.*, 80 Iowa, 593.

We must not be understood as holding that a property owner may dictate the location of poles in front of his premises, nor that he may recover damages, however trivial, which may be caused by their location.

5 The railway company has the right to so place its poles as to secure the best results for its railway, provided that it so places them as not to cause any unnecessary injury. The injurious consequences which it must guard against are those of a substantial character. The placing of poles in front of property is seldom desired by the property owner, and may in some slight degree interfere with the use of his property, as by obstructing the view from it; but for such injury alone he would rarely, if ever, be entitled to relief. The placing of a pole in a walk or roadway, however, or in front of and near to an important window, if the pole could as well be placed elsewhere, might afford ground for relief. But we cannot undertake to lay down general rules which would govern all cases. Each, of necessity, must be decided according to its own facts. It follows from what we have said that the district court erred in sustaining the demurrer, and its judgment is REVERSED.

DEEMER, C. J. (dissenting).—I do not think the petition states a cause of action, and I dissent from the second paragraph of the opinion. I especially dissent from the doctrine that a pole placed in front of a window is a nuisance. The doctrine of ancient lights does not obtain in this state. I am authorized to say that Mr. Justice WATERMAN, joins in this dissent.

J. E. BIXBY V. THE OMAHA & COUNCIL BLUFFS RAILWAY
AND BRIDGE COMPANY, Appellant.

Evidence: MEDICAL BOOKS. Medical works are not admissible under
§ Code, section 4618, making historical works and books of science

105	293
d109	201
105	293
f110	530
f110	651
105	293
113	115
105	293
123	351
105	293
127	443
105	293
d132	229
105	293
14	

or art presumptive evidence of facts of general notoriety or interest therein stated.

SAME. Medical books, although admitted to be standard, cannot be
1 read to the jury for the purpose of proving the symptoms of dis-
2 ease, where they have not been referred to by witnesses whom
they are offered to contradict.

Appeal from Pottawattamie District Court.—HON. N.
W. MACY, Judge.

TUESDAY, MAY 10, 1898.

ACTION for damages occasioned by the negligence of defendant. Trial to jury, verdict and judgment for plaintiff, and defendant appeals.—*Reversed.*

Wright & Baldwin for appellant.

Harl & McCabe for appellee.

LADD, J.—This action is brought for injuries sustained by the plaintiff in a collision between a street car of the defendant and a train on the Chicago, Burlington & Quincy Railroad. The liability of the defendant appears to have been conceded at the trial, and the extent of the injury and the amount to be allowed as damages were the only questions in controversy. There was some contusion of the skin and bruises, but these soon disappeared, and at the time of the trial, there was no objective or external evidence of any injury. The theory of the plaintiff was that he had received a serious shock to his nervous system, and had symptoms indicating locomotor ataxia or some neurotic trouble. Dr. Barstow testified to such symptoms, while Drs. Jennings, Lacey, and Thomas insisted that there existed no signs of any disease. The plaintiff was permitted, over the objection of the defendant, to read in

evidence extracts from "Pepper's System of Medicine," Vol. 5, under the heads, "Tabes Dorsalis, Locomotor Ataxia," "Morbidity Anatomy," and "Physiology"; from a work by Dr. Ranney, under the heads "Nerve Cells and Nerve Fibers," "Spinal Neurasthenia"; from a work by Dr. Hirt, entitled "Diseases of the General Nervous System," under the heads "Functional Neurosis," "Diseases of the Pneumogastric Nerve," and "Affections of the Air Passage Due to the Lesions of the Vagus"; also extracts from a lecture by S. Weir Mitchell on "Permanent Headache"; and from a lecture by Dr. H. B. Wood on "The Remote Effects of Traumatism, as Seen by the Neurologist." These works were admitted

1 to be standard, but had not been quoted or cited as authorities by the physicians in giving their testimony. The portions read to the jury treated of the symptoms, and not the cure, of diseases, and might be fairly well understood by those somewhat acquainted with the nomenclature of the medical profession. These extracts cover twenty-four pages of the abstract, and it is impractical to set them out. While they might aid the educated physician to a better understanding of the matters discussed, we are satisfied their tendency was to mislead and confuse the jury. A person of ordinary comprehension could not understand much of the language used, and would be in great danger of being misled by the grouping of symptoms. The learning of these works, if extracted by a skilled physician and applied to the particular case, and thus brought within the comprehension of the jurors, would doubtless have been of great assistance in ascertaining the true condition of the plaintiff. But as they assume a technical knowledge on the part of the reader, and capacity to understand the relative importance to be attached to symptoms, we think they could not be safely left to their interpretation and inferences. As

said by Chief Justice Shaw in *Ashworth v. Kittridge*, 12 Cush. 193 (59 Am. Dec., 178): "Medical science has its own nomenclature, its technical terms and words of art, and also common words used in a peculiar manner, distinct from their received meaning in the general use of the language. From these and other causes, a person not versed in medical literature, though having a good knowledge of the English language, would be in danger, without an interpreter, of misapprehending the true meaning of the author; whereas, a medical witness would not only give the fact of his opinion and the grounds on which it is formed, with the sanction of his oath, but would also state and explain it in the language intelligible to men of common experience." The question is not whether the courts will use the helps of science in the investigation of truth. There is no controversy on that score. The authorities are agreed that the truths of the exact sciences, the established facts of history, and computations from fixed data may be proven by the works of reputable authors. *Worcen v. Railway Co.*, 76 Iowa, 310; *Gorman v. Railway Co.*, 78 Iowa, 509; *Scagel v. Railway Co.*, 83 Iowa, 380; *Schell v. Plumb*, 55 N. Y. 598; *Mills v. Catlin*, 22 Vt. 98. This is on the ground that all men assent to their correctness. But medicine belongs to the class known as inductive sciences. The data is constantly shifting with new discoveries, and the conclusion which may be considered sound to-day is repudiated tomorrow. A medical work may be standard this year and obsolete next. The opinion of the same author changes in the different editions, owing to new discoveries and a better understanding of symptoms. The very best works, aside from observations, are largely made up of the opinions either of the author or of others compiled. It is a well-known fact that physicians after research and investigation often differ radically.

It was said in *Clark v. State*, 12 Ohio, 483 (40 Am. Dec. 481), where the sanity of the defendant was involved, that "whenever they have enlisted on the side of either party, or of some favorite theory, and one portion of the profession is placed in array against another, the difficulties mentioned in the passage above quoted are greatly multiplied, and, however honest or renowned for professional character the witnesses may be, such will be the conflict of their testimony, in nine cases out of ten, that it will be utterly unsafe for a jury or court to follow or adopt the conclusions of either side." If those learned in medicine are often unable to determine from the books the nature and extent of injuries and diseases, how shall the laymen be better informed by an examination of them? The situation emphasizes the necessity of cross-examination and the use of an oath, not only that the theory contained in the books may be known and understood, but that practical skill may apply the science of medicine to each case. As said, not the use of the inductive sciences in the investigation of truths, but the manner—the vehicle, as it were—by which the results of research shall be conveyed to the court and jury is involved. We think the safer practice is to rely upon the testimony of living witnesses of the medical profession, who may bring the learning and reasearch of the books within the comprehension of the jurors, and the truths of science to the facts in each particular case. Indeed, the advocates of a contrary rule generally admit the necessity of additional safeguards, which may only be provided by legislation. See article by John Henry Wigmore in 26 *American Law Review*, 390. The language of the supreme court of Michigan in *People v. Hall*, 48 Mich. 482 (12 N. W. Rep. 665), is so pertinent that we quote it with approval: "Scientific or expert testimony must be given by living witnesses who can be cross-examined

concerning their means of knowledge, and can explain in language open to general comprehension what is necessary for the jury to know. The only legal reason for allowing the evidence of opinions is found in the presumption that an ordinary jurymen or other person without special knowledge could not understand the bearing of facts that need interpretation. Medical books are not addressed to common readers, but require particular knowledge to understand them. Every one knows the inability of ordinary persons to understand or discriminate between symptoms or groups of symptoms, which cannot always be described to those who have not seen them, and which, with slight changes and combinations, mean something very different from what they mean in other cases. The cases must be very rare in which any but an educated physician could understand detached passages at all, or know how much credit was due to either the author in general or to particular parts of his book. If jurors could be safely trusted with the interpretation of such books, it is hard to see on what principles witnesses would be required. Scientific men are supposed to be able, by their study and experience, to give the general results accepted by the scientific world, and the extent of their knowledge is tested by their personal examination. But the continued changes of view brought about by new discoveries in most matters of science, and the necessary assumptions by scientific writers of some technical knowledge in their readers, render the use of such works before juries—especially in detached portions and selected passages—not only misleading, but dangerous. The weight of authority, as well as of reason, is against their reception.” The exclusion of such evidence is approved on substantially the same grounds by the following among many authorities: *Johnston v. Railroad Co.*, 95 Ga. 685 (22 S. E. Rep. 694); *Fowler*

v. Lewis, 25 Tex. Supp. 390; *Melvin v. Easley* 46 N. C. 386; *State v. O'Brien*, 7 R. I. 336; *Epps v. State*, 102; Ind. 539 (1 N. E. Rep. 491); *Boyle v. State*, 57 Wis. 472 (15 N. W. Rep. 827); *Reg. v. Taylor*, 13 Cox. Cr. Cas. 77; *Ware v. Ware*, 8 Me. 42; *Tucker v. Donald*, 60 Miss. 460; *Ordway v. Haynes*, 50 N. H. 159; *Huffman v. Click*, 77 N. C. 55; *Payson v. Everett*, 12 Minn. 217 (Gil. 137); *Collier v. Simpson*, 5 Car. & P. 73; *Harris v. Railroad Co.* 3 Bosw. (N. Y.,) 7.

Our conclusion is somewhat opposed to language contained in *Bowman v. Woods*, 1 G. Greene, 441. In that case a physician was sued for malpractice in an accouchement case, and in defense set up that he had followed the botanic system of practicing medicine. It appears the plaintiff so knew in employing the defendant, and physicians were called to show that his treatment was in accordance with that system. They referred to certain standard works on botanic medicine, from which they claimed to have derived much of their professional knowledge. Such books were held admissible. If a physician is employed to treat a patient according to a certain system, and he does so, exercising ordinary skill therein, he has fulfilled his obligation. Now, in determining whether he has in fact followed that system, the books from which physicians of that school are shown to have derived their knowledge may be admissible, for these expound the very principles which he is alleged to have violated; and certainly, under such circumstances, the books themselves would be better evidence than quotations from them. In such a case a physician might refer to an author as justifying his conclusion that the treatment was or was not in accordance with his system, and as said in this case: "Being permitted to refer to and quote authors, we can see no good reason why they may not read the views and opinions of distinguished

authors. The opinions of an author, as contained in his works, we regard as better evidence than the mere statement of those opinions by a witness, who testified as to his recollection of them." The reasoning does not apply to a case where the school or system is not involved; for it is not the rule to permit the physician to quote from medical works. See *Boyle v. State*, 57 Wis. 472 (15 N. W. Rep. 827); *Com. v. Sturtivant*, 117 Mass. 122; *Ashworth v. Kittridge*, *supra*; *Marshall v. Brown*, 50 Mich. 148 (15 N. W. Rep. 85); *People v. Wheeler*, 60 Cal. 581 (44 Am. St. Rep. 70); *Collier v. Simpson*, *supra*.

2 It seems, however, that, where the witness has referred to some medical authority to sustain the opinion he has expressed, that authority may be introduced in evidence for the purpose of contradicting him. *Pinney v. Cahill*, 48 Mich. 584 (12 N. W. Rep. 862); *City of Ripon v. Bittel*, 30 Wis. 619; *City of Bloomington v. Shrock*, 110 Ill. 219. See, *contra*, *Davis v. State*, 38 Md. 15. In *State v. Howard*, 10 Iowa, 101, the only point decided is that a medical work cannot be taken to a jury room. In *Donaldson v. Railway Co.*, 18 Iowa, 280, the Carlisle tables are admitted on the strength of the ruling in *Bowman's Case*. In *Brodhead v. Wiltse*, 35 Iowa, 429, it is held that section 4618 of the Code, adopted after the decision in the *Bowman Case*, was not restrictive in its effect, and rendered no evidence inadmissible which was admissible before, and that standard medical authorities are not the best evidence of what they teach, as was intimated in *Bowman's Case*. In *Quackenbush v. Railway Co.*, 73 Iowa, 458, the objection to the extract offered was that it was too indefinite, and this was overruled. In *Peck v. Hutchinson*, 88 Iowa, 320, the objection was simply that the medical work offered was an old edition, and its introduction was held to be without prejudice. We do not think *Bowman's Case* decisive of the question now before us,

and certainly no other can be so construed. In Alabama alone are medical works received in evidence. *Stoudenmeier v. Williamson*, 29 Ala. 558, followed in the subsequent cases of *Merkle v. State*, 37 Ala. 139, and *Bales v. State*, 63 Ala. 30. In the first of the above the issue involved the breach of warranty in the sale of a slave. That the objections to the admissibility of such evidence are not answered is evident from the following quotation, which is not inconsistent with the rule we adopt: "The brief period of human life will not allow one man, from actual observation and experience, to acquire a complete knowledge of the human system and its diseases. Professional knowledge is in a great degree derived from the books of the particular profession. In every step the practitioner takes, he is, perhaps, somewhat guided by the opinions of his predecessors. His own scientific knowledge is, from the necessities of the case, materially formed and molded by the experience and learning of others. Indeed, much of the knowledge we have upon all subjects, except objects of sense, is derived from books and our associations with men. It is the boast of this age of advancing civilization that, aided and facilitated by the printer's art, the collected learning of past ages has been transmitted to us. Shall we withhold the benefits of this heritage from the contests of the court room? We think not."

The appellee insists these treatises were admissible under section 4618 of the Code, which is as follows: "Historical works, books of science or art, and published maps or charts, when made by persons
3 indifferent between the parties, are presumptive evidence of facts of general notoriety or interest therein stated." As said in *Broadhead v. Wiltse*, *supra*, the purpose of the legislature was to extend the rule of evidence rather than to restrict it. This extension is

limited, however, by the words, "facts of general notoriety or interest therein stated." The supreme court of California in construing a statute identical with ours, except the last two words are omitted, used this language: "What are facts of general notoriety and interest? We think the terms stand for facts of a public nature, either at home or abroad, not existing in the memory of men, as contradistinguished from facts of a private nature, existing within the knowledge of living men, and as to which they may be examined as witnesses. It is of such public facts, including historical facts, facts of the exact sciences, and of literature or art, when relevant to a cause, that, under the provisions of the Code, proof may be made by the production of books of standard authority. * * * Such facts include the meaning of words and allusions which may be proved by ordinary dictionaries and authenticated books of general literary history, and facts in the exact sciences, founded upon conclusions reached from certain and constant data, by processes too intricate to be elucidated by witnesses when on examination." *Gallagher v. Railway Co.*, 67 Cal. 13 (6 Pac. Rep. 869). We think this the correct interpretation of this section, and that it does not authorize the admission of medical treatises. This identical question was before the United States circuit court of appeals for this circuit in *Railway Co. v. Yates*, 25 C. C. A. 103 (79 Fed. Rep. 584), and in a clear and exhaustive opinion a like conclusion was reached. See, also, *Van Skike v. Potter*, (Neb.) (73 N. W. Rep. 295). The exceptions to the other rulings on the admissibility of evidence are without merit. The other errors assigned are not likely to arise upon another trial—REVERSED.

THEODORE JONES, Assignee, v. C. E. CHESEBROUGH AND
JAMES L GIESLER, Assignees, Appellents.

Banks: TRUST FUNDS. An assignee for creditors who deposits funds in a bank which subsequently becomes insolvent, is not entitled to recover the amount deposited from the assignee of the bank as trust funds, where the bank had on hand only a very small amount in cash at the time it failed, the money so deposited was mingled with other money and used by the bank in the usual and ordinary course of business in the payment of its debts, and no new loans were made by the bank and no property of any kind or securities on hand had been purchased with the money so deposited.

Appeal from Muscatine District Court.—HON. WILLIAM
F. BRANNAN, Judge.

TUESDAY, MAY 10, 1898.

THE plaintiff is the assignee of Nebergall Bros., and the defendants are assignees of A. A. Ball & Co., both firms having made assignments for the benefit of creditors. The cause was submitted on the following agreed statements of facts: "(1) That on December 12, 1895, E. L. Nebergall and J. A. Nebergall, as Nebergall Brothers, in the boot and shoe business at West Liberty, Iowa, made a general assignment to the plaintiff, who accepted the trust. (2) That the defendants are assignees of A. A. Ball & Co., and of A. A. Ball and S. T. Chesebrough, the members of said firm. (3) That on Dec. 12, 1895, A. A. Ball and S. T. Chesebrough, under the firm name of A. A. Ball & Co., were bankers at West Liberty, Iowa, and so continued to the 19th day of September, 1896, when the firm and the members thereof made a general assignment for the benefit of their creditors. (4) That the plaintiff, as assignee, opened an account with said firm on the twelfth day of December,

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1895, and continued the same, adding thereto from time to time by placing the proceeds of his sales and collections with them, until the 22d day of August, 1896; that he thus placed with them in said period the sum of \$3,628.95, and withdrew by check the sum of \$241.60, and that the remainder, to wit, \$3,387.35, had not at the date of the assignment of A. A. Ball & Co. been delivered to the plaintiff; that no part of the said money was kept separate, but was by said A. A. Ball & Co. mingled with their own money, and used by them in the usual course of banking in the payment of their debts; that, during all of said period, the plaintiff, as an individual, had a personal account with said A. A. Ball & Co.; that he kept the same separate from his account as assignee; that because of the two accounts, he, when depositing, always indicated to which account the credit should be made; that, before said A. A. Ball & Co. received any money from the plaintiff as assignee, he explained to them that he was assignee of Nebergall Brothers, and that, as such, he would place on deposit the funds of his trust, and they agreed to receive them; that afterwards said funds were deposited with them, they knowing at the time each deposit of said trust funds were received that they belonged thereto. (5) That before this suit was commenced, and on December 10, 1896, plaintiff filed his claim with the defendant assignees, setting up his claim as above, and demanding that the balance be delivered to him at once, but said demand was refused. (6) That, at the date of the assignment of A. A. Ball & Co., they had no property of any kind, or securities in their hands, which had been purchased with the money deposited by the plaintiff, and no new loans had been made or property acquired by said bankers after plaintiff began depositing said money. (7) That, within a few days previous to the assignment of Ball & Co., there was paid into their hands a considerable amount of money

belonging to the independent school district of West Liberty, most of which was paid out to depositors; that on the 12th day of December, 1896, by decree of this court, at the suit of said district, all the assets in the hands of the defendants as assignees were impressed with a trust in favor of said district to the amount of \$6,199.43, which sums the assignees have since paid from collections made by them. (8) That the cash on hand at the date of the assignment of A. A. Ball & Co., and belonging to said firm and the members thereof, was only \$449.62. (9) That, for one year next preceding the assignment of A. A. Ball & Co., the amounts paid out to depositors very largely exceeded the deposits received, and there was paid out to the depositors, and for expenses, all cash on hand and received, including \$30,000 borrowed by pledge of a part of the notes owned by the bank, save the said balance of \$449.62, remaining at the time of the assignment. (10) That the assets of the bank at the time of the assignment and coming to the assignees as such were of the estimated value of \$186,000, and the estimated liabilities at the time were \$221,000." The prayer is that the money received may be adjudged trust funds, and the claim be preferred. The district court gave the relief asked by the plaintiff, and the defendants appealed.—*Reversed*.

Carskaddan & Burk and *Jayne & Hoffman* for appellant.

J. E. McIntosh and *P. M. Detwiler* for appellee.

GRANGER, J.—In *Plow Co. v. Lamp*, 80 Iowa, 722; *Independent District of Boyer v. King*, 80 Iowa, 498; and in *Nurse v. Satterlee*, 81 Iowa, 491, this court sustained preference where, under an assignment for the benefit of creditors, the assignee or agent wrongfully deposited funds in an insolvent bank, that were received

with knowledge of their trust character where the money deposited had been placed with the several funds of the bank, and used in the payment of debts or the business of the bank, in a way that the identical money could not be traced or other property found into which it had been placed. This holding is based on conclusions of fact that the money was placed in the bank, so that the transaction did not create the relationship of debtor and creditor between the owner of the money and the bank, nor that of depositor in a bank; but, because the deposit was unauthorized and wrongful, the money, as soon as placed in the bank, became a trust fund, and could not, properly, in case of an assignment for the benefit of creditors by the bank, pass to the assignee as a part of the assets of the estate. The case of *Independent Dist. of Boyer v. King, supra*, recognizes the fact that the authorities are in conflict as to the extent to which the rule should be applied. The facts in this case are such that appellant contends—*First*, that it is distinguishable from the cases cited; and, *second*, that, if not distinguishable, such holdings are not in harmony with the current of authority. Appellee contends with much earnestness that there are no distinguishing facts in this case, and that it should be affirmed on the authority of the cited cases.

The contention in argument makes it important to define wherein the rule of this court, as formerly announced, is misapprehended by some. While we have not adhered to the rule that, to justify a preference the money must be identified or traced to a particular fund, of which it is all or part, or, in other words, "traced and followed into other property into which it has been converted, that remains the subject of the trust," we have held that, before such a preference can be sustained, it must appear that the estate has been so benefited by the misappropriation of the trust fund that its

removal or its equivalent from the estate will be without prejudice to creditors; in other words, that the conditions must be such that the creditors have the same protection as if the trust money had been retained in the bank in a way that it could be identified and taken, which latter would be the right of a *cestui que trust* under all authorities. To illustrate: If A., as trustee, wrongfully places trust funds in a bank, regularly doing business, and that money,—say, one thousand dollars,—is paid out in the usual course of business to discharge a debt of the bank, when, had it not been so paid out, other money of the bank would have been so used, and that is the last business transaction of the bank before assignment, we think it clear that the assets of the bank are one thousand dollars more than if the trust money had not been placed there, and that, when one thousand dollars of other money is used to replace it with the owner, the creditors are in no sense prejudiced. We do not hold that such money, when used to pay the debts of a bank, necessarily increases the assets of the bank, in the sense that creditors are not prejudiced. That may be the case, and it may not be. Whether it is or not is a question of fact. The rule here stated is practically stated in *Independent Dist. of Boyer v. King supra*. To create such a trust, it is there said: "It does not appear that any of the identical money deposited went into the possession of defendant. On the contrary, the admitted facts justify the conclusion that he received but little, if any, of it; and, if a trust for the amount in question is established it must be on the ground that the deposit must be held to have increased the estate of the insolvents, and that the balance due is represented by an increase now in the hands of the assignee." Added to this seemingly conclusive language is the following, in the same opinion: "In this case it appears that the money in question was received

by the Cadwells, and that their estate was increased by that amount. As they received it knowing its trust character, it will be presumed, in the absence of a showing to the contrary, that it was preserved by them in some form, and that it passed into the hands of the assignee. It is not material for the purpose of this case whether the balance was preserved in the form of money or in other property. It is only necessary that it appear, by presumption of law or otherwise, that it has been preserved in the hands of the defendant. The money having been traced to the estate of the Cadwells impressed with the character of a trust fund, the burden was upon the defendant to show that it contributed nothing to the estate which he acquired by virtue of the assignment, and that he has failed to do so." The opinion in the case quoted from was filed on the same day as that of *Plow Co. v. Lamp, supra*, and contains a reference to it. Both were considered at the same time, are published in the same volume of our reports, and the scope of the holdings ought not to be misunderstood, and, we think, are not, except where there are misconceptions or mistakes as to facts or a failure to note the extent of our discussions of the subject. /We are referred to the case of *Slater v. Oriental Mills*, 18 R. I. 352 (27 Atl. Rep. 443). In that case, referring to the *Plow Co. Case*, it is said: "The court lost sight of the distinction which we desire to make clear, between funds remaining in the estate, which go to swell the assets, and funds which, having been dissipated or used in the payment of debts, do not remain in the estate, and so do not swell the estate." It will be seen that the dividing line with that court is whether the estate, in the hands of the assignee, has been increased by the wrongful deposit. If so, the equity, to justify a preference, exists. If not so, it does not. That is precisely our rule. But we have not said that, to carry out the rule, the identical money

must be discovered and taken, or the specific property into which it has been converted. But we have said, in effect, that it matters not where the identical money is, if the estate, in the hands of the assignee is so enlarged, because of the wrongful deposit, that, if the amount of it is taken out, the remaining assets, for distribution, will be no less than if the wrongful deposit had not been made. The difference is not one as to equitable principles that fix the rights of parties, but in the method by which the equitable result is to be attained. We confess surprise, in view of our unmistakable holdings, at some language employed in the *Rhode Island Case*, wherein, by omissions and inferences that are without support, the rule of this court is misrepresented, and for a purpose, apparently, to pave the way for an attempt at witty criticism.

We now look to the facts of this case to see if they bring it within the rule to warrant a preference. A. A. Ball & Co. made its assignment for the benefit of creditors September 19, 1896. The deposits made by the plaintiff with A. A. Ball & Co. extend from December 12, 1895, to August 22, 1896. The assets of the bank at the time of the assignments were one hundred and eighty-six thousand dollars, and its liabilities two hundred and twenty-one thousand dollars. It appears that, during the year previous to the assignment, the amount paid out to depositors largely exceeded the deposits received, and, of the money so paid out, thirty thousand dollars was borrowed by the bank by a pledge of notes as security, and that the bank, at the time of the assignment, had on hand but four hundred and forty-nine dollars and sixty-two cents in cash. It also appears that the money deposited by the plaintiff was mingled with other money, and used by the bank, in the usual and ordinary course of banking, in the payment of its debts. It further appears that, after the plaintiff commenced to

make deposits, to the date of the assignment, the bank made no new loans, nor acquired any property, and also that no property of any kind or securities on hand had been purchased with the money deposited by plaintiff. These facts do not bring the case within the rule we have stated. All that can be said is that a failing bank received the money, and paid it out in the usual course of business to its creditors, under circumstances that show that the assets of the bank were no more at the date of the assignment than they would have been had the deposit not been made. The bank had not only used the money coming in as deposits, but had borrowed money to pay on its debts, showing a purpose to apply all money in that way, be the same more or less. While the payment of debts in that manner by a trust fund lessens the indebtedness of an insolvent estate, and may thereby increase the percentage of dividend to be declared from other funds, it does not follow that the assignee has any increase of assets because of it. It may follow that he has less debts to pay, and the estate is in that way benefited. But such a benefit to the creditors is but partial, and, if such a payment is to serve as a reason for withdrawing an equal amount from the assignee, the result is an absolute loss to the creditors. We do not think a preference should be sustained under such conditions. We are content with the rule of the *Independent Dist. of Boyer Case*,—that, when trust money has been received, it is not material whether it is preserved in the form of money or other property; but it must appear, by presumption of law or otherwise, that it has been preserved in the hands of the assignee, as an increase of assets in his hands, from which it may be taken without impairment of the rights of creditors. The judgment must be, and is, REVERSED.

J. W. HUNT, Administrator of the Estate of ELENOR
SAMPSON, Deceased, v. S. C. JOHNSTON AND
JOSEPH JOHNSTON, Appellants.

Fraudulent Conveyance: EVIDENCE: *Father and child.* One who was insolvent, during the time of his indebtedness to plaintiff,
2 conveyed to his son a quarter section of land and some town lots,
3 and the son paid certain debts of the father in consideration therefor. The father had at one time considerable property and the son had nothing; and subsequently the son had considerable property and the father had nothing, without sufficient income belonging to the son, or losses upon part of the father, to account for the change. The son denied, upon being assessed, that he was possessed of money or credits, and acted as financial agent of the father, and collected money belonging to the father, without sufficiently accounting for it. *Held*, that the circumstances justify a finding that the conveyance was made to hinder, delay and defraud the creditors of the father.

BURDEN OF PROOF. One who acts as confidential agent or banker for his father must be able to show on a creditor's bill to subject
3 to the payment of a judgment against the fathers' property of the son claimed to have been purchased with money belonging to the father, that he has accounted for all that he received from the father, where he collected a large amount for him and kept no account of the same.

SUBSTITUTION OF PLAINTIFF: *Order nunc pro tunc.* Where, for the trial of an action, the plaintiff's administrator is substituted for the original plaintiff, but judgment is taken in the name of the
1 original plaintiff, which judgment is subsequently corrected in that respect, but the order correcting it is not signed until after an action in the nature of a creditor's bill to subject the property to a judgment has been begun on the judgment by plaintiff's administrator, the order may be made *nunc pro tunc*, and, when entered, cures the defect in the judgment, and validates all subsequent proceedings thereon.

Judgment: PRAYER. A decree in a creditor's bill for the cancellation of certain notes and mortgages alleged to constitute the consideration for the conveyances sought to be set aside is improper,
5 where there is no prayer in the petition for the cancellation of such mortgages and no reference of any kind is made to them.

Pleading: REPLY. A reply asking that certain notes and mortgages, alleged to constitute the consideration for conveyances sought to
4 be set aside, be canceled of record should be stricken from the files where no such relief was sought in the complaint, and the answer was simply a denial.

Appeal from Marion District Court.—HON. JOHN A. STORY, Judge.

TUESDAY, MAY 10, 1898.

CREDITORS' bill to subject certain real estate standing in the name of S. C. Johnston to the payment of a judgment held by plaintiff against Johnston & Frush and Joseph Johnston. The trial court subjected the property to the payment of the judgment, and defendants appeal.—*Modified.*

Geo. W. Crozier and Earle & Prouty for appellants.

L. N. Hays and J. D. Gamble for appellee.

DEEMER, C. J.—Elender Sampson, deceased, had a suit pending at the October term of the Marion county district court against the defendant Joseph Johnston. On the second day of that term, J. W. Hunt, his administrator, was substituted as plaintiff; but the case, for some reason, proceeded to judgment in the name of the original plaintiff. This suit was
1 commenced November 15, 1895. Prior to the bringing of the action, an execution issued on the judgment as rendered, and was returned, "No property found." On the twelfth day of the following December the district court, on motion, made an order correcting the judgment entry so as to show that the judgment was in fact entered in favor of the substituted plaintiff. This order was not signed by the judge until the trial of this case, in March, 1896, when the omission

was discovered; and the court then and there, on motion of appellee's counsel, had the record of the former term read and signed. Appellants contend that, as no judgment existed in plaintiff's favor at the time this suit was commenced, he cannot recover. Their argument is based upon the proposition that a creditors' bill will not lie until judgment is recovered. This may be accepted as a general rule,—although there are some exceptions,—but it does not follow that the case should be dismissed. It must first appear that there was no judgment in fact. The entry of December, 1895, was in reality a *nunc pro tunc* order for judgment. It was in fact nothing more than making of record that which had theretofore been done. In making the order the court necessarily determined that the judgment, as originally rendered, was in favor of this appellee, and that the entry showing judgment in favor of the deceased was an error. This ruling is not appealed from, and no error is assigned thereon. We must assume that it was properly entered *nunc pro tunc*. When so entered, it cured all existing defects, and validated all subsequent proceedings thereon. See *Doughty v. Meek*, 105 Iowa, 16. The cases of *Gilman v. Donovan*, 53 Iowa, 362, and *White v. Secor*, 58 Iowa, 533, are not in point, for the reason that in neither was there in fact a judgment for the substituted plaintiff, but in each there was an attempt to have one rendered as of the date when the judgment in favor of the deceased was obtained. In these cases the remedy could only be under section 3154 *et seq.* of the Code of 1873, while in the case at bar it was properly by motion for a *nunc pro tunc* entry.

II. Appellee denies the jurisdiction of this court, on the ground that the clerk of the district court was not paid or secured his fees for making a transcript until more than a year after the appeal was taken.

The record discloses, not only that the clerk waived this requirement, but that an approved bond was in fact given on May 25, 1897. The bond, even if required, was given in time, and the appeal was properly perfected. *Harrison v. Palo Alto County*, 104 Iowa, 383; *Fairburn v. Goldsmith*, 56 Iowa, 348; *Slone v. Berlin*, 88 Iowa, 205; *Bruner v. Wade*, 85 Iowa, 666.

III. We come now to the merits of the case. Plaintiff's judgment was obtained, as we have seen, in October, 1895. The defendants in judgment were

Johnston & Frush and Joseph Johnston, the
2 defendant herein. On the twelfth day of June,

1895, and at a time when defendant Joseph Johnston was indebted to Elender Sampson, he (Johnston) conveyed to S. C. Johnston, his son, one hundred and sixty acres of land, and certain town lots in the city of Knoxville, for the expressed consideration of ten thousand dollars. At the same time he executed mortgages upon all his remaining property, real and personal, to his creditors, of which there were many. These mortgages were executed without the knowledge of the mortgagees, and some of them were never accepted. He also assigned his books of account and notes to a daughter. The conveyance of the real estate to the son, S. C. Johnston, is challenged because made with intent to hinder, delay, and defraud creditors. Defendants claim that the consideration for the conveyance was composed of the following items: *First*, a note executed by Johnston & Frush to E. M. and H. Kent, trustees, for the sum of two thousand and eighty-nine dollars and seventy-five cents, secured by a mortgage upon the land; *second*, a note executed by Joseph Johnston to one Kimmerer for the sum of one thousand and forty-seven dollars and eighty-six cents; *third*, a note executed by Joseph Johnston to one Messenkopf, for the sum of two thousand, seven hundred and six

dollars and sixty cents, and secured by mortgage upon the property; *fourth*, an indebtedness of Joseph Johnston to F. N. Bellamy, guardian, for the sum of one thousand, five hundred and thirty-four dollars and nineteen cents; *fifth*, some items of account due from J. Johnston & Son and Johnston & Frush; *sixth*, cash advanced to and for J. Johnston, amounting to one hundred and twenty-eight dollars and eleven cents; and, *seventh*, taxes paid by S. C. Johnston upon the property. S. C. Johnston claims that he purchased the notes mentioned as items, one, two, and three; that he assumed the payment of item four, which was a valid indebtedness to the guardian; that J. Johnston & Son and Johnston & Frush were indebted to him as stated; that he advanced the cash as claimed; and that the conveyance was made in satisfaction of these various items. The evidence shows, without dispute, that S. C. Johnston took an assignment of the Kent, Kimmerer, and Messenkopf notes, and that he gave his individual checks for the amount thereof at the time he took the assignments. It also appears that he assumed the payment of the Bellamy note, and that he, nominally, at least, furnished money to and for his father as claimed. And there is at least *prima facie* evidence that the firms of which we have spoken were indebted to him in the amounts claimed. The payments to which we have referred were nearly all made by checks drawn in the name of S. C. Johnston. While admitting all these facts, appellee claims that the money in fact belonged to J. Johnston, the father, and that when S. C. Johnston took the assignments of the various notes, and made the payments claimed, he used money belonging to his father; that the transaction, in so far as it related to any of the obligations of Joseph Johnston, was in fact a payment, and not a purchase thereof. He also claims that the conveyance was made as a cover

to hinder, delay, and defraud the creditors of Joseph Johnston. The burden is, of course, upon appellee to establish these claims. The evidence relied upon is to the effect that the parties are father and son; that the son acted as financial agent or banker for the father; that the father was at one time possessed of a large amount of property, and the son had nothing; that the son is now possessed of a large amount of property, and the father has nothing; that the father had no serious losses at any time, and that the son had no such income as would account for the large amount of property in his hands; that the father in fact furnished the consideration for the payment or purchase of the Kimmerer note, by making a loan upon his lands, and turning the amount over to his son; that the son collected the accounts and rents belonging to the father, and has not made a sufficient accounting thereof; that the conveyance was made to the son at a time when the father was insolvent, but without particular solicitation on the part of the son; that at the same time the father made a conveyance of his homestead to his wife, and, without solicitation, made mortgages upon all his remaining property to his creditors; that the son, when being assessed, denied that he was possessed of any moneys or credits; that the son was already secured when the conveyance in question was made, and that no creditor was then pressing the father; that the father at the same time assigned all his notes and accounts to a daughter; that the son knew the father's financial condition, and took the conveyance for the purpose of thwarting the father's creditors. These, with some others, are the claims relied upon to show fraud in the conveyance. We will not undertake to review all the evidence relied upon to support these claims. It is our practice, in such cases, to state conclusions only. That the son did act as a financial

agent, and to a certain extent as manager, for the father, is beyond dispute. He collected notes and accounts of the old firm of Johnston & Frush, and of the firm of Johnston & Son. He collected rents for the use of the real estate owned by his father. He was his father's trusted adviser. Father and son both claim, however, that all money so collected was properly accounted for; and it is true that all money which was deposited in the banks in the name of J. Johnston is accounted for. But the son had a very large deposit account, which is hardly explainable on any theory other than that it was made up from money received from his father's business or rentals. The son had no income which would account for so many and so large deposits as appear to his credit in the various Knoxville banks. He kept no account of the money collected for his father, although he admits having received large sums from time to time.

3 True, he says that he properly accounted for all that he received. But in an action of this kind, where confidential and trust relations are established, the trustee must act in the utmost good faith, and must be able to show by clear and satisfactory evidence that he has accounted for all that he has received. The state of his bank account is not explainable upon any other theory than that it was increased from time to time by large amounts, which he does not satisfactorily account for. The father does not show any great losses in his business; that is, enough to account for the large shrinkage in his property during the last ten years he was in business. And the son's account grew about as fast as the father's assets were depleted. The consideration for the payment or purchase of the Kimerer note was undoubtedly furnished by the father, who made a loan for this purpose. The son claims, however, that, while the father obtained the money in

this manner, yet he (the father) was indebted to him (the son) upon a note for one thousand, nine hundred and seventy-one dollars, and that so much of the money which the father borrowed as would take up the Kimmerer note was applied upon the note the son held against the father, and the son took the money, and purchased the Kimmerer note, and returned the balance of the loan, amounting to nine hundred and fifty-two dollars and fourteen cents, to the father. Such an arrangement is possible, but it is hardly probable, in the light of the record. The note for one thousand, nine hundred and seventy-one dollars is claimed to be lost, and the books of Johnston & Son and Johnston & Frush, introduced in support of some of appellants' claims, do not bear the impress of truth. At the time appellant S. C. Johnston claims to have purchased the Messenkopf and Kent notes and mortgages, he (Johnston) was engaged in the erection of buildings upon his own account which called for considerable sums of money. True, at this time he was making large deposits in the banks, but he was engaged in no business which would produce such returns. We are constrained to believe that the money which he was so using and depositing came from Joseph Johnston. The assumption of the debt to F. N. Bellamy seems to be established, and it further appears that S. C. Johnston, after he received the deed, made a mortgage to secure this debt upon the farm lands secured by him. There is in the record evidence of the alleged purchase by S. C. Johnston of many other notes made by his father to third persons. This evidence is not wholly satisfactory, and is evidently furnished to account for some of the large transactions appearing upon the bank books containing S. C. Johnston's account. The reasonable theory of these transactions is that S. C. Johnston used his father's money in paying these debts, and, instead

of having them canceled, procured their assignment to himself. S. C. Johnston knew when he received the conveyance in question the amount and extent of his father's indebtedness. He knew that he could not long continue in business. If he owned the notes and mortgages, as he now claims, he was quite secure, and did not need the deeds for his protection. The sister to whom Joseph Johnston assigned his notes and accounts was not pressing her claim; the general creditors were doing nothing to cause alarm; and yet Joseph Johnston makes the deeds, mortgages, and assignments referred to, and thus places everything beyond the reach of those creditors who were not secured, or who did not see fit to accept the mortgages made. The circumstances point to the conclusion that the conveyances were made to hinder, delay, and defraud the creditors of Joseph Johnston.

Appellants further argue that the court was in error in setting aside the mortgages upon the land, which it appears were not canceled by S. C. Johnston after he received the deeds from his father. The
4 original petition does not ask such relief. It simply asked that the conveyances from father to son be set aside. The defendants filed a general denial. After the case was submitted, and had been taken under advisement, the plaintiff filed a reply, in which he asked that the notes and mortgages which defendants say, in evidence, constituted the consideration for the conveyances, be set aside, and canceled of record. Thereafter defendants moved to strike this reply, for the reason, among others, that it asked relief not sought or prayed for in the original petition, and set up matters which should have been pleaded in the petition. This motion was overruled. As the cause is triable *de novo*, such ruling is subject to review. From

the statement made, it is apparent that the reply introduced a new cause of action. True it is that appellee might have amended his petition to make the pleading conform to the proofs, but this he did not do. In the case of *Marder v. Wright*, 70 Iowa, 45, it is said: "A plaintiff is not permitted to plead in his reply matters which are material only to the cause of action alleged in his petition. Much less will he be permitted to recover on a distinct cause of action which is pleaded only in his reply." See, also, *Jones v. Marshall*, 56 Iowa, 739. The answer was simply a denial, and a reply is not permissible under such circumstances.

Code 1873, section 2665. The reply should have
5 been stricken from the files. With this out of the record, there was no prayer for cancellation of the mortgages, and no reference of any kind made to them in the petition. The decree, in so far as it undertook to satisfy and extinguish the mortgages, was without authority, and should be modified to that extent. In so far as it sets aside the conveyance of June 12, 1895, it is affirmed; and, in so far as it undertakes to satisfy and cancel the mortgages upon the property it is reversed.—MODIFIED AND AFFIRMED.

In the Matter of the Estate of WILLIAM E. KING,
Deceased, on the Petition of E. J. CHRISTIE, Admin-
istrator, and LYDIA M. KING, Appellees, v. B. KING,
Administrator, and the BURLINGTON, CEDAR RAP-
IDS & NORTHERN RAILWAY COMPANY, Appellants.

Executors and Administrators: JURISDICTION OF COURTS. The county of the residence of the decedent has exclusive jurisdiction
1 to grant letters of administration under Code, 1873, section 2312, as amended, providing that the district court of each county shall have "exclusive jurisdiction" of the appointment of administrators.

SAME. The district court of the county in which the decedent resided,
8 which, by Code, 1873, section 2312, as amended, has exclusive jurisdiction of the appointment of administrators, may properly ignore

105	320
109	668

105	320
114	746

105	320
121	346

105	320
125	430

a void appointment by the district court of another county, and take any necessary steps to settle the estate.

SAME. In proceedings to annul letters of administration granted without jurisdiction, the court has no power to pass on the validity of a settlement made by the administrator. Its powers are confined to annulling the letters issued by it.

SAME: Transfer. Proceedings for the administration of an estate, commenced in another county than that in which decedent resided, which latter county, under Code, 1873, section 2312, as amended, has exclusive jurisdiction of such proceedings, should not be transferred to the county of the decedent's residence, as there is nothing to transfer.

Judgment: COLLATERAL ATTACK. The appointment of an administrator by the district court of another county than that in which decedent resided, in violation of Code, 1873, section 2312, as amended, may be collaterally attacked where the petition for letters recites that the decedent resided in another county, thus showing the want of jurisdiction on its face

Construction of Statute. If a statute is ambiguous or obscure, the court will consider consequences, in interpreting it.

Appeal from Linn District Court.—HON. H. M. REMLEY, Judge.

WEDNESDAY, MAY 11, 1898.

THIS proceeding was instituted, primarily, to annul the letters of administration issued in said estate to the defendant B. King. The district court adjudged the appointment of King void, and canceled his commission. From this judgment the defendants appeal. There was also an appeal by plaintiffs from another branch of the court's order, to which further reference will be hereafter made.—*Affirmed.*

J. C. Cook, Thos. H. Milner and J. C. Leonard for appellant B. King.

S. K. Tracy for appellant Burlington, C. R. & N. Ry. Co.

Rickel & Crocker for appellees.

WATERMAN, J.—William E. King, a resident of Emmet county, in this state, was in the employ of defendant railway, and was killed in a collision on its road, caused, as is claimed, by the negligence of the railway company. King was unmarried. His sole heirs at law were his father and mother, who were living separate and apart. The mother's home was in Blackhawk county, and the father was living in Benton county, in this state, at the time of the son's death. The general offices of the railway company were in Cedar Rapids, in Linn county; and at the time of King's death the company was indebted to him in the sum of thirty-one dollars and sixty-five cents for wages due. Very shortly after King's death, which occurred on November 7, 1895, his trunk, containing some property, was sent by the railway company to Cedar Rapids; and on the twelfth day of that month his father, B. King, petitioned the district court of Linn county for letters of administration upon his estate. On the same day letters were issued by said court, and the administrator was, by an order in proper form, authorized to settle the claim of the estate against defendant railway, which was based upon the alleged negligence of the latter in causing the death of intestate. On the thirteenth day of November, 1895, the administrator filed his first report, reciting that he had collected the wages due deceased, and had settled the claim for his death with the railway company for the sum of one thousand dollars, all of which was duly approved by said court. The mother of the intestate has never accepted any part of the money so obtained from the railway company. On October 28, 1896, the plaintiff E. J. Christie was duly appointed administrator of the estate of said William E. King by the district court of Emmet county, and has qualified and given bond as such. On November

17, 1896, Christie and Lydia M. King, the mother of decedent, instituted this proceeding to have the letters of administration to B. King annulled, and also asking that the settlement with the railway company be declared void and of no effect. The district court revoked the letters to King but declined to make any further order in the matter. Both parties appealed; plaintiffs excepting to the court's refusal to annul the settlement with the railway company. The appeal of defendants being first perfected, they are denominated the appellants.

II. The first question presented by the record is as to the jurisdiction of the Linn district court. Section 2312 of the Code of 1873, as amended by chapter 134,

Acts Twenty-first General Assembly, provides:

1 "The district court of each county shall have original and exclusive jurisdiction of the probate of wills and the appointment of such executors, administrators or trustees as may be required to carry the same into effect; of the settlement of the estates of deceased persons," etc. Appellants' contention is that the courts of counties where property of deceased is located have concurrent jurisdiction to administer the estate; the one first taking action to hold, as against the others. Appellees insist that the county of the residence is the seat of exclusive jurisdiction. The rule contended for by appellants might well be productive of much mischief, and we are not inclined to adopt it, unless compelled to do so by the plain and explicit provisions of the law. In the Code of 1851, section 1272, and in the Revision of 1860, section 2304, the jurisdiction of the county courts, which were then the courts of probate, was expressly limited to the settlement of the "estates of all persons who at the time of their death were residents of the county or who die non-residents of the state, having property to be administered upon

within the county," etc. Section 225 of the present Code contains substantially the same provision with relation to the district court, which now, and for some years past, has had jurisdiction of matters in probate. It seems that before 1873, and since the adoption of the Code of 1897, the policy of our law has been to make the county of the residence of the decedent the place of jurisdiction for the settlement of his estate. The Code of 1873 vested this jurisdiction in the courts of "each county." This expression is manifestly a limitation or restriction. If it be said that it means each county in which the decedent left property, there might be very many of these. No one does or will claim that it means any county in which the party may die. There is then but one other fact by which to fix the jurisdiction, and that is the fact of residence, and this fixes it always in some one county. A man can have at any one time but one legal residence. It is easily and always ascertainable. And we think it is by this that the jurisdiction in the settlement of estates is to be determined, and the county fixed in which the proceedings are to be conducted, so far as regards residents of the state. The section of the Code under consideration is not so explicit in its terms as might be desired, but its context shows quite clearly that the legislative thought was that the jurisdiction of the court was to be confined to the county of decedent's domicile. Section 2338, Code 1873, provides that any person having the custody of a will must deposit it with "the clerk." And the following sections provide with relation to the "court or clerk" fixing the time for proving the will; of "the clerk" giving notice, etc. No particular court or clerk is mentioned or pointed out. The assumption seems to be that the preceding section (2312) has settled that matter. But it does not settle it unless it points out some one county, and only one, in the

state, where such jurisdiction is vested. It would produce much confusion, and perhaps some harm, if, upon the death of a resident owning property in different counties, administration of his estate might be had in some county remote from his residence, simply because at his death some part of the assets of his estate should

be there found. If the legislative intent is clear, 2 we have nothing to do with consequences; but, if the statute is ambiguous or obscure, we may well and properly consider results, in interpreting it. Our conclusion is that the district court of Emmet county had exclusive jurisdiction to appoint an administrator of the estate of William E. King, and that the appointment made by the Linn district court was void.

III. The appointment of B. King being void, it was proper for the Emmet district court to ignore what was done in Linn county, and take any necessary steps to settle the estate. Indeed, B. King's appointment being void, it might have been collaterally 3 attacked. His petition for letters recited that the residence of deceased was in Emmet county, thus showing upon its face the want of jurisdiction in Linn county. *Moore's Estate v. Moore*, 33 Neb. 509 (50 N. W. Rep. 443); *Sitzman v. Pacquette*, 13 Wis. 291; *Chase v. Ross*, 36 Wis. 267.

IV. Appellants say that the remedy of appellees, if the district court of Linn county had no authority to settle the estate, was to have the proceeding transferred to Emmet county. But this is not a case of want of proper venue. There was a lack of jurisdiction. 4 There was nothing to transfer. We might add, further, that the statute makes no provision for any such proceeding as the transfer of estates from one county to another.

V. When the Linn district court annulled and recalled the letters issued to B. King, we think it did

all that it had any power to do. The effect of the settlement with the railway company, and the
 5 rights of the parties under it, must be determined in some other tribunal, and in some other manner. On both appeals the action of the district court is AFFIRMED.

THE BUTTERICK PUBLISHING COMPANY v. C. D. BAILEY,
 Appellant.

Contract: SALE AND RETURN. A contract between a manufacturer and retail dealer provided that the dealer should act as special agent in the sale of certain patterns; that manufacturer should furnish patterns to a certain amount, and the dealer should pay for them half in cash and half by interest bearing standing credit;
 1 that dealer should pay for all other goods "purchased" from manufacturer before the fifteenth of the succeeding month; that old patterns might be exchanged for new ones, but not "in payment for goods ordered prior to the time of return;" that dealer's failure to keep in stock at least three hundred dollars worth of patterns should entitle the manufacturer to declare the contract forfeited, and the standing credit due; that either party might terminate the contract after a year, on three months' notice, and that, if so terminated, the dealer should have the right to return all patterns on hand to manufacturer and receive seventy five per cent of the price paid therefor. *Held*, a contract of sale and not a contract on "sale or return."

LOSS OF GOODS BY FIRE. The loss by fire of goods obtained and partly paid for under a contract which obligated one party to
 2 exchange other goods for them, and, under certain conditions, to accept and pay a certain price for them, does not relieve the other party from liability to pay the balance due.

Appeal from Dallas District Court.—HON. J. H. APPLE-
 GATE, Judge.

WEDNESDAY, MAY 11, 1898.

THE plaintiff and defendant executed the following agreement in writing: "Articles of Agreement between the Butterick Publishing Co., Limited, and C. D. Bailey,

of Adel, Iowa. This agreement, made this 24th day of April, 1894, between the Butterick Publishing Co., Limited, of the first part, and C. D. Bailey, of the second part, witnesseth: That the said Butterick Publishing Co., Limited, for the consideration hereinafter mentioned, agree to grant, and do hereby grant, to the party of the second part, the right to act as special agent for the sale of their patterns in the town of Adel, state of Iowa, for the term of one year from date, and upon the following conditions: Said party of the second part agree that—will at all times give, or cause to be given (by a lady attendant), proper attention to the sale of the patterns. Said party of the second part also further agrees that he will advertise, with advertising matter which shall be ordered by party of the second part from party of the first part, at such times as shall be thought advisable by said Butterick Publishing Co., Limited, to the amount of twenty (20) dollars per annum. Neglect to perform this obligation shall work a forfeit of the right to return the patterns for money at the final closing of this agreement. Said Butterick Publishing Co., Limited, agree to furnish said party of the second part with advertising matter, at their present prices for the same, for the purpose of such advertising. Said party of the second part agree to pay all expenses incurred in the transportation of goods, and further agree to pay to the Butterick Publishing Co., Limited, for patterns to be furnished by them, the sum of one hundred and fifty (150) dollars, as follows: Twenty-five (25) dollars on signing contract; balance on or before July 1, 1894. And in consideration that said party of the second part agree to keep not less than three hundred (300) dollars value in patterns at wholesale rates (40 per cent. of retail prices) on hand for sale at all times during the time this agreement shall remain in force, the party of the first part agree to grant, and do hereby grant, to the:

said party of the second part a standing credit, which shall continue during the time this agreement shall remain in force, to the amount of one hundred and fifty (150) dollars. This credit shall bear interest at the rate of four per cent. per annum during the whole time this contract shall continue, which interest shall be paid by party of the second part to party of the first part semi-annually on January 1st and July 1st of each year; and no excess of credit over the amount above specified shall be demanded. Said party of the second part also agree to pay for any and all other goods purchased from the said Butterick Publishing Co., Limited, promptly on or before the 15th day of the month succeeding the month in which the purchase is made. It is also expressly stipulated and agreed that if, at any time, the party of the second part shall not make the monthly payment as herein provided, said Butterick Publishing Co., Limited, may, at their option, without further notice, make a sight draft on the party of the second part for the amount due; and in case of neglect or refusal to pay such draft said Butterick Publishing Co., Limited, may declare this contract forfeited, and at an end; and, in case the interest of the party of the first part shall be neglected by the party of the second part to the extent that no payment shall be made for the term of three months, then said party of the second part shall forfeit all right to return patterns either for exchange or otherwise, and said party of the first part shall be relieved of all responsibility to party of the second part in all matters pertaining to this agreement. Said Butterick Publishing Co., Limited, or any party delegated by them, shall be allowed to examine and take account of pattern stock at any time they may so desire to do; and if at any time between March 1st and July 1st, or between September 1st and January 1st, of any year, said stock of patterns shall be found to be in

amount less than the amount hereinabove specified, then the above-specified standing credit in current funds, shall be due to the party of the first part from party of the second part and the amount hereinabove specified—one hundred and fifty (150) dollars—shall at once be paid by the party of the second part to the party of the first part, and said party of the first part shall be relieved from all obligations to continue a standing credit to the party of the second part, and this contract, at the option of the party of the first part shall, in all its provisions, be null and void, and said party of the first part shall be relieved from any obligation to exchange or redeem the stock of patterns said party of the second part may have on hand. In case said party of the second part shall perform his agreement as specified, then said party of the first part agree to allow said party of the second part to return old patterns in exchange for new ones, at the following rate and on the following conditions: Said party of the first part shall allow said party of the second part to exchange patterns purchased under this agreement at the rate of nine-tenths the sum paid for them; but they shall not be returnable in payment for goods ordered prior to the time of return; nor shall they be exchangeable for other goods than patterns; nor shall this rate of exchange apply on goods bought prior to date hereof. And, further, the patterns must have been procured direct from the party of the first part, and not through any other party, unless by written permission; and if any patterns shall have been stamped or marked (otherwise than by mark affixed by party of the first part at the time of sale) wet, opened, or in any way damaged or defaced, then they shall not be returnable. This agency for the sale of patterns manufactured by party of the first part shall not be removed by party of the second part from its original business location, or

assigned to other parties, nor shall any other patterns than those manufactured by the party of the first part be sold by the party of the second part, without the written consent of the Butterick Publishing Co., Limited. This contract shall remain in force for the term of one year from date, and thereafter continue until it shall have been terminated, in the following manner: At any time after the expiration of one year either party desirous of terminating this contract may give the other three months' notice, in writing, of a desire to do so; and upon the expiration of the three months following such notice, whether given by party of the first part or by party of the second part, all patterns held by party of the second part shall be returned to the party of the first part at their general office in New York, with a bill of the same. Failure or neglect to return, at the time above specified, all the returnable patterns said party of the second part may have on hand shall relieve the party of the first part from all responsibility in the matter of exchange or allowance in consideration of the return of such patterns, and the party of the first part may sue for and collect any sum owing by party of the second part, without taking into consideration the pattern stock said party may have on hand. But, in case the stipulations above specified shall be duly performed by the party of the second part, and the patterns shall be returned to the party of the first part at their general offices in New York, within one week,—either before or after,—the time above designated as the time of return, and if the provisions of this contract shall have been duly performed by the party of the second part, then said party of the first part agrees to pay to the party of the second part in current funds within thirty days from the time of the delivery to them of said patterns, seventy-five per cent. of the amount paid for same; but the patterns thus returned must have been procured direct

from the party of the first part, and not through any other party; and, if any patterns shall have been stamped or marked (otherwise than by mark affixed by party of the first part at time of sale) wet, opened, or in any way damaged or defaced, then they shall not be returnable. In witness of this agreement we have hereunto signed our names this twenty-fourth day of April, 1894. Done at Adel, state of Iowa. The Butterick Publishing Co., Limited, per H. A. Stearns. C. D. Bailey." The petition shows that in pursuance of the agreement plaintiff delivered to defendant patterns at wholesale rate, of the value of three hundred dollars, receiving therefor one hundred and fifty dollars, and extended to defendant a standing credit for one hundred and fifty dollars, according to the terms of the contract; that defendant has violated the terms of the agreement by neglecting to keep on hand patterns as agreed; that he has permitted the patterns to become damaged and destroyed by fire, and has renounced his obligations under the contract; and judgment is asked for the amount of standing credit given to defendant, with interest thereon. Defendant demurred to the petition, which demurrer the court overruled, and thereupon the defendant filed an answer and counterclaim, to each of which the plaintiff demurred, and the demurrer as to both was sustained. Defendant electing to stand on his answer and counterclaim, judgment was entered for plaintiff, and the defendant appealed.—*Affirmed.*

White & Clark for appellant.

Shortley & Harpel for appellee.

GRANGER, J.—I. Noticing first the demurrer to the petition, appellant states the questions to be considered as follows: "(1) Whether the contract set out

in the petition expresses or implies a sale of goods to Mr. Bailey. (2) Whether any contingency has happened that renders Mr. Bailey liable to pay plaintiff any sum on account of the goods." A significant feature

1 of the contract is this: That throughout its provisions there are none that justify a conclusion that the patterns are to be taken by defendant, and sold, and the proceeds of the sales to be accounted for to the plaintiff. The agreement was that the defendant should act as special agent in the sale of the patterns; that plaintiff should furnish patterns to a certain amount, and defendant should pay for them one-half in a specified time, and receive a standing credit for the other half, which credit was to bear interest. The meaning of the contract is that defendant should be the agent to sell patterns furnished by plaintiff, he (defendant) to pay for the same, and sell on his own account. While the parties, for certain purposes, treat the relationship as that of principal and agent, the obligations under the contract depend upon its conditions and terms. As we read the contract, patterns furnished by plaintiff, and paid for under the terms of the contract, passed entirely from the right or control of plaintiff, so that it could have no claim thereto, absolute or contingent. The right of return was optional with defendant. While, in the part of the contract providing for its termination, it is stated that when the notice is given all patterns held by party of the second part shall be returned to party of first part, the entire provision on the subject shows that, while plaintiff must receive and pay for them, when properly returned, defendant's neglect or refusal to return them gave to plaintiff no right except exemption from paying therefor under the stipulation for a return. There is what is called a contract "on sale or return," which Judge Story defines as an "agreement by which

goods are delivered by a wholesale dealer to a retail dealer to be paid for at a certain rate, if sold by the latter; and, if not sold, to be returned." Story, Sales, section 249. See 21 Am. & Eng. Enc. Law, 518, and authorities cited. It is thought by appellee that the transaction comes within such a rule, but we think its conditions are different, and indicate more conclusively a sale to the defendant. Except in view of a termination of the contract, there is no right of return in this case, as in the cases contemplated by the rule as to contracts on sale or return; but the contract merely gives the right to return old patterns in exchange for new ones, and the patterns so returned for exchange are designated as "patterns purchased under this agreement." It is also provided that patterns so returned "shall not be returnable in payment for goods ordered prior to the time of return." This provision is significant, and means that patterns of a particular purchase are not returnable in payment of that purchase, but, when returned, they must be exchanged for other patterns. The provision for return in case of a termination of the contract is simply one of a re-purchase by paying a specified sum therefor, and not as a return of property belonging to the plaintiff. This thought has strong support in language used in *Warder v. Hoover*, 51 Iowa, 491. Parmalee & Hurd received from Warder, Mitchell & Co. certain "extras" to be sold on commission, with the right to return them if unsold; but they were required to pay for them on delivery. In the opinion it is said: "Where the agreement is that goods are to be paid for in cash on delivery, and the goods are delivered, it appears to us that there is a sale, whether the payment is made or not. The condition, as in this case, that they may be returned if not sold, is a condition that the sellers will re-purchase." This case is even stronger in support of the transaction being a sale,

for there was not only to be a payment for the patterns, but there was no right of return merely because there was no sale. There is no right of return in this case except for exchange, only upon a termination of the contract, and then to be paid for by the plaintiff. We think the conclusion that the transaction was a sale is not to be avoided. If there was a sale, the answer to appellant's second query, whether there is a contingency that renders defendant liable, is, that his acknowledged breach of the contract renders him liable for the credit extended him under the contract; that is, to pay the balance of the purchase price of the patterns received.

II. The answer to the petition admits the contract, and that he received the patterns, paying thereon one hundred and fifty dollars, and received credit of one hundred and fifty dollars, as provided in the
2 contract. It is then alleged that in October, 1894, without fault on his part, the stock of patterns was accidentally destroyed by fire, because of which the patterns were not returned. By way of counterclaim the answer pleads the advance payment of the one hundred and fifty dollars, and seeks to recover the seventy-five per cent. thereof to which he would be entitled if he returned the patterns under the contract. A demurrer to both the answer and counterclaim was sustained, and the correctness of the ruling is now for consideration. On this branch of the case reliance seems to be placed on the fact of the destruction of the patterns by fire, so they could not be returned; and the rule is invoked that, where property is taken under an agreement to re-deliver it, and it is destroyed without the fault of the one taking it, he is absolved from his obligation; as where one who charters a vessel under an agreement to return it, and it is destroyed without his fault, he is excused from his obligation. *Young v.*

Leary, 135 N. Y. 569 (32 N. E. Rep. 607). See, also, *Seevers v. Gabel*, 94 Iowa, 75, and *Norton & Co. v. Melick*, 97 Iowa, 564. This case is far from being in line with those quoted, or applicable to the rule invoked by appellant. In the last-cited case the ownership of the property was reserved to the company with right of possession, and the contract was held to be one of agency. *Seevers v. Gabel* is a case where property was leased, and presents no such question as this case. Our consideration of the demurrer to the petition practically disposes of this branch of the case. Defendant purchased and owned the patterns. The plaintiff, under certain conditions, was obligated to exchange other patterns for them, and, under certain conditions, to accept and pay a certain price for them. It is nowhere provided that defendant's misfortune in the loss of them should create any liability on the part of plaintiff. The judgment will stand **AFFIRMED**.

AARON BURGHER, JR., Appellant, v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

106	335
138	153

Carriers: CONTRACTS. A shipping contract by which the shipper agrees, in consideration of the advantage of the lower of two rates of shipment that the stock is to be loaded and unloaded and fed

- 1 by the shipper or his agent, and that the company shall not be liable for any injury in loading or unloading by delay of train except those occurring by gross negligence, is valid under Kansas act, March 6, 1883, section 13, providing that no railway company shall
- 5 be permitted, except as otherwise provided by regulation or order of the board of railway commissioners created by such act, to change or limit its common law liability as common carriers and under an order by such board providing that where any railway company has two rates for the shipment of freight, the lower rate is to apply when the common law liability is limited, it shall be lawful for such company to change or limit its common law liability in such manner as may be specified by the terms of the contract, providing that it shall not be relieved from any liability on account of the negligence of the company.

DAMAGES. An owner of live stock, who undertakes to oversee the transportation of such stock, and to attend to loading, unloading, feeding and watering it, cannot recover for any injury occasioned by his own fault, even though the contract does not relieve the company from liability.

Agency: AUTHORITY OF AGENT. Evidence that the agent at the railroad station informed the shipper of the rates made by the general freight agent between two other stations, and told him his understanding of the time and connection of trains between those stations, is not sufficient to establish the authority of that agent to contract for the shipping of freight between those stations.

Evidence: PAROL VARIANCE. Evidence as to oral communications by a station agent to a shipper of cattle, prior to the execution of a written contract for their shipment, is inadmissible in the absence of fraud or mistake.

Appeal from Davis District Court.—HON. F. W. EICHELBERGER, Judge.

WEDNESDAY, MAY 11, 1898.

ACTION in equity to reform a contract for the shipment of cattle, and to recover damages for an alleged breach thereof. Decree was rendered reforming the contract in one of the particulars prayed, and judgment entered dismissing plaintiff's petition. Plaintiff appeals.—*Affirmed.*

Payne & Sowers for appellant.

Carroll Wright and *S. S. Carruthers* for appellee.

GIVEN, J.—I. The pleadings and proofs are somewhat lengthy, and need not be set out in full. The following is a sufficient statement thereof for an understanding of the issues to be considered: Agra, Kan., Ellis, Neb., and Centerville, Iowa, are stations on defendant's railway. Some days prior to September 9, 1895, the plaintiff, contemplating the shipment of one car load of cattle from Agra and one

from Ellis to Centerville, called upon the defendant's station agent at Ellis for terms upon which the cattle would be shipped over the defendant's road. There being another line over which defendant could ship, he evidently desired to avail himself of the competition and to secure the most favorable terms. The defendant had in force two rates for the shipment of this class of freight, the higher rate to apply where no limitation of the strict common-law liability of the carrier was made, and the lower rate to apply when such liability was limited. Said agent at Ellis communicated by wire with defendant's general freight agent as to the rates that would be allowed to plaintiff from Ellis and from Agra, and informed the plaintiff of the answer. On the morning of September 9, 1895, the car load of cattle at Agra was loaded and shipped, one Ed Burgher being carried on the train on a shipper's pass as the person having charge of the cattle. On the evening of the same day the cattle at Ellis were loaded and carried hence in a fast freight train, the plaintiff being on the train and in charge of said cattle. The car load of cattle from Ellis arrived at Centerville on time and in good order, but the car load from Agra did not arrive at Centerville until about five o'clock p. m., September 11th. These cattle from Agra were not fed or watered, or the milch cows milked, while on the road, in consequence of which they were materially depreciated in value, and it is for this depreciation that plaintiff seeks to recover damages.

II. Plaintiff alleged and introduced evidence tending to show that he had entered into an oral contract with the defendant's agent at Ellis for the shipment of both cars of cattle; that it was agreed that the car from Agra would be shipped so as to reach Ellis on the evening of the ninth, in time to be taken into the fast freight train in which the car from Ellis was carried, so that

plaintiff could accompany both cars, and so that they would arrive at Centerville on the time of that train,

without the necessity of feeding, watering, or
2 milking on the way. The defendant denies that

its agent at Ellis had authority to, or did, make and contract for the shipment of the cattle from Agra, and denies that he had authority to, or did, make any other contract for the shipment from Ellis than the one made in writing. It appears that on the ninth of September, and before the shipment of the cattle from Ellis, the plaintiff, as owner and shipper, and the defendant, by its station agent at Ellis, executed a written contract for the shipment from Ellis. It also appears that, before the shipment of the cattle from Agra, Ed Burgher and the defendant, by its station agent at Agra, executed a like written contract for the shipment of the cattle from Agra. Appellant contends that Ed Burgher had no authority to execute said last-named contract, and prays that the same be reformed by inserting the plaintiff's name as the owner and the shipper of the cattle. The district court so reformed said contract, and of this the defendant does not complain. This reformation is manifestly correct. Therefore, that contract will be considered as if the name of the plaintiff appeared therein as owner and shipper. We are in no doubt, from all the circumstances, especially from the correspondence by wire that passed between plaintiff and Ed. Burgher on the eighth and ninth of September, that Ed Burgher was authorized to represent the plaintiff in paying for and shipping the cattle from Agra, and that instead of executing the shipping contract in his own name he should have executed it for and in the name of the plaintiff. It is not claimed that any oral contract was made after the execution of these written contracts, and it is clear that whatever was said between the plaintiff and the agent at Ellis as to the

terms of the shipments was said prior to the execution of the written contracts. Therefore the district court properly held that in the absence of fraud or mistake, - evidence as to said oral communications was
3 inadmissible. We may say, further, that, even if said declarations were competent, we think they fail to show authority in the agent at Ellis to contract for the shipment from Agra, or that he did so contract. All that he did was to inform the plaintiff of the rates given by the general freight agent, which were the rates at which the shipments were made; also to inform him of his understanding as to the time and connection of trains.

III. With respect to the authority of Ed Burgher, it appears that the plaintiff was not at Agra, and had no personal communications with the defendant's agent at that station in regard to the shipment. The cattle were brought in and loaded by a Mr. Fauts, for the plaintiff. Ed Burgher, twenty years of age, a nephew of the plaintiff, who resided with the plaintiff in Iowa, was at Agra, on a visit, and with plaintiff's permission was to return to Iowa with the cattle on a shipper's pass. There seems to have been some delay in the receipt of the money with which the Agra cattle were to be paid for, and on September 8th and 9th telegrams passed between Ed Burgher, at Agra, and the plaintiff, at Ellis, as follows: On the eighth Ed Burgher wired plaintiff: "Money has not come." Plaintiff answered: "Tell one man to stay with cattle. Pay his expenses. If money not there morning, I will be there to-morrow." Ed Burgher answered: "Money has not come. Cattle here." Plaintiff replied: "Money was expressed yesterday from Beatrice. If not satisfied, answer." On the ninth Ed Burgher answered: "Cattle paid for. Will come on 96 this morning." These messages were transmitted and received by the defendant's agents at

Agra and Ellis. Plaintiff must have known that the cattle were not to be shipped from Agra until a contract was signed, and that the agent at Agra would understand from said messages that Ed Burgher was acting for the owner. There is no claim that the agent at Agra, who alone could contract for the shipment from that point, did make any other contract than that

expressed in the writing. The plaintiff asks that
4 said written contract be reformed so as to express the agreement as alleged to have been orally made with the agent at Ellis, but, in view of the conclusion already announced with respect to that alleged contract, such reformation cannot be granted. We are clearly of the opinion that the rights of the parties as to the damages claimed must be measured by the written contract under which the shipment from Agra was made, reformed only by inserting the name of the plaintiff as owner and shipper of the cattle.

IV. We now inquire whether, under the written contract as thus reformed, the defendant is liable for the damages caused to the cattle shipped from Agra because of their not having been fed, watered, and
5 milked while in transit. Said contract provides:

“That, for and in consideration of rates named
and privileges above enumerated, the said Aron Burgher, Jr., agrees to ship one car of cattle (29 head, more or less) from Agra, Kas., to Centerville, Iowa, and said railway company agrees to receive and haul the same.” Immediately following this, said contract provides as follows: “Which stock is to be loaded and unloaded, watered, and fed by the said Ed Burgher (Aron Burgher, Jr.), or his agent. And in consideration of free transportation for one person, hereby given by said railway company, such person to accompany the stock, it is agreed that the car containing the stock of said Burgher is in sole charge of said person or his

agents, for the purpose of attention and protection of stock while in transit, and the company assumes no responsibility for safety to stock in charge of shipper or his agents, whether from theft, heat, jumping from car, injury in loading or unloading, injury or damage which stock may do to themselves, or which may arise from the reasonable delay of trains, or from any other cause, or accident or injury, except those occurring by gross negligence of the company." The rate named was the lower rate allowed when liability was limited. There is no provision in the contract as to the train or routes by, or the time in which, the cattle should be carried. It is undisputed that, if that part of the contract quoted above is to control, the defendant is not liable for the damage caused to the cattle for want of feed, water, and milking. Plaintiff contends that that part of said contract is in violation of the constitution of the state of Nebraska and the statutes of Kansas, and is therefore invalid. As we find that the only contract made for the shipment of the cattle from Agra was made in Kansas, we need not inquire as to the provisions of the constitution of Nebraska. The statute of Kansas and the order of its board of railway commissioners are admitted to be correctly set out in the answer. Section 13 of the act approved March 6, 1883, creating the board of railroad commissioners, is as follows: "No railroad company shall be permitted, except as otherwise provided by regulation or order of the board, to change or limit its common-law liability as a common carrier." On September 1, 1893, said board of railroad commissioners, under authority of said section, promulgated an order providing as follows: "That hereafter where any railroad company doing business in the state of Kansas shall have in force two rates for the shipment of any class of freight within said state, the higher rate to apply to such shipments where no limitation of the

strict common-law liability of said railroad company is made, and the lower rate to apply when such liability is limited, it shall be lawful for such railway company, by contract entered into between such company and any shipper, to change or limit its common-law liability in such manner and to such extent as may be specified by the terms of said contract: provided, that such contract shall not relieve such railroad company from any liability on account of the negligence of such company." As already stated, defendant had in force two rates, and this shipment was made at the lower rate, and is therefore within the authority given in this order. Appellant quotes a statute of Kansas providing that railroads shall be liable for all damage to person or property, when done in consequence of any neglect on the part of the railroad companies. Surely, railroad companies are liable for neglect, but the inquiry here is whether this contract is valid, and, if so, whether under it it was the duty of the defendant or of the person in charge of the cattle to feed, water, and milk them. Appellant refers to section 4032 of the Code of 1873, which makes it a misdemeanor for any railway company, owner, or custodian of animals to confine the same in cars for a longer period than twenty-eight consecutive hours without unloading for rest, water and feeding, "unless delayed by storm or other accidental cause." Clearly, the carrier is not liable in damages to the owner, where the neglect is that of the owner or custodian. This contention is fully answered in the recent case of *Grieve v. Railroad Co.*, 104 Iowa, 659. Section 2074 of our Code is as follows: "No contract, receipt, rule or regulation shall exempt any railroad corporation engaged in transporting persons or property, from the liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made

or entered into." The contract in that case was identical with this as to the care of the cattle in transit. In that case it is said: "But the company had the right to employ the plaintiff by furnishing him transportation to accompany the stock, load and unload, water, and feed it; and if he actually undertook to do this, and injury was occasioned by his negligence, it is not perceived on what theory the carrier may be held responsible. In such a case damages resulted, not from any lack of care on the part of the carrier, but from that of the owner.

* * * Now, if the owner undertakes to oversee the transportation of his stock and to attend to loading and unloading it, feeding and watering it, whether by contract or voluntarily, and it suffers injury through his fault, he cannot recover, though the contract in no way relieves the company from liability."

V. Accepting the written contract as controlling, we now inquire whether the defendant is liable for the damage caused to the cattle by reason of their not having been fed, watered, and milked while in transit. Ed Burgher was authorized by the plaintiff to be and was carried on the train with these cattle on a shipper's pass, and as the person in whose sole charge the cattle were, "for the purpose of attention and protection of the stock while in transit." The cattle were unloaded and kept in a stockyard all of the first night out, but were not fed, watered, or milked. It does not appear that Ed Burgher at any time asked that the cattle be fed, watered, or milked. The fact is that plaintiff, expecting that car to be in the same train with the car which he accompanied, did not furnish Ed Burgher with money to buy feed, and Ed Burgher did not ask the defendant's agents to furnish the feed, and charge it on the waybill, as he might have done. It is entirely clear that under the contract the duty of caring for the cattle in these respects was upon the

plaintiff, and not upon the defendant. No doubt, if the Agra cattle had arrived in time to be carried from Ellis in the same train with the Ellis cattle, this damage would not have resulted; but the defendant did not contract that the Agra cattle should be so carried, and it was plaintiff's neglect that he did not provide for their care in the event of their being carried by a different train or over a different route. After a most careful consideration of the case, we reach the conclusion that the judgment of the district court should be **AFFIRMED**.

CLENDENEN BOGGS v. ARCHIE DOUGLASS, Appellant.

Cotenancy. One tenant in common of land, who ousts the other from
 4 possession, is liable for the reasonable rental value of the land, and not merely for the amount which he received therefor.

SATISFACTION OF LIEN. A judgment plaintiff in lawful possession of land on which his judgment is a lien has no right to apply the
 1 rents and profits derived therefrom to the satisfaction of such judgment as against the owner of such land who is not a judgment defendant.

Judgment: ASSIGNMENT. The assignee of a judgment acquires no
 2 rights which were not possessed by his assignor.

Transfer to Equity. A motion to transfer to the equity side of the calendar, an action to recover rents and profits of certain land, is
 8 properly overruled, where a judgment assigned to plaintiff, which is a lien on land and interposed as a defense, does not constitute any defense.

Appeal from Monroe District Court.—HON. T. M. FEE,
 Judge.

WEDNESDAY, MAY 11, 1898.

ACTION to recover rents and profits of certain lands. The defendant alleged he held possession of one tract under a judgment and decree establishing it as a lien, and ordering the sale thereof, and asked that the rents

and profits derived therefrom be applied in satisfaction of the judgment. This relief was denied and he appeals.—*Affirmed.*

T. B. Perry for appellant.

Wm. A. Nichols for appellee.

LADD, J.—In *Boggs v. Douglass*, 89 Iowa, 150, the title to an undivided one-half of the south one-half of the northeast one-fourth of section 32, in township 7 north, of range 16 west of fifth principal meridian, was adjudged to be in the plaintiff, though subject to the lien of a judgment recovered by Cassady against William and Aaron Hicks, and assigned to the defendant, and that to the other undivided one-half thereof in the defendant. This was one of the judgments considered in *Fordyce v. Hicks*, 76 Iowa, 41, and established as a lien against this land superior to plaintiff's title in *Boggs v. Douglass*, 100 Iowa, 385. It may be mentioned that the plaintiff acquired his title under a sheriff's deed executed in June, 1888. Trimble obtained a judgment against William and Aaron Hicks, and began proceedings to subject this land to its payment after an action for the same purpose had been commenced by Cassady. A decree was entered as prayed, and from the sale thereunder of Aaron Hicks' interest therein the plaintiff redeemed by virtue of a judgment procured by him from Shaw, and received the deed as stated. The defendant acquired title and possession of the land February 17, 1883, under a deed from William and Aaron Hicks, declared fraudulent in the several cases referred to. It will also be observed that
1 the defendant held possession and denied the plaintiff's ownership; thus ousting him as tenant in common. See *Boggs v. Douglass*, *supra*. He continued in possession from June, 1888, when the plaintiff

acquired title to an undivided one-half, up to the beginning of this action. That he must account for the rents and profits of such half interest is not questioned, but it is asserted on his part that these should be applied to the satisfaction of his judgment. The result of the decree was the establishment of the judgment as a lien on the land, the same as though no conveyance had been made by Hicks to the defendant, and special execution was ordered that the remedy might be effectual. In such a case the creditor obtains no advantage or lien superior to that he would have had in event of no conveyance by the judgment defendant except in so far as acquired by greater diligence in bringing his action. In other words, the conveyance was good against the whole world except the creditors of the grantor, and these gained nothing thereby, and lost nothing if they asserted their rights in apt time. The question involved, then, is whether a judgment plaintiff in lawful possession of lands on which his judgment is a lien has the right to apply the rents and profits derived therefrom to the satisfaction of that judgment as against the owner thereof, not a judgment defendant. The appellant bases his claim of such right on a supposed analogy with a mortgagee in possession. Where the common-law doctrine prevails, the estate is vested in the mortgagee, and he may take possession on condition broken (in some of the states before this occurs), and apply the rents collected on the mortgage debt. 1 Jones, Mortgages, section 702; 3 Pomeroy, Equity Jurisprudence, section 1187. In Iowa the equitable theory prevails, and the title remains in the mortgagor. *Hall v. Savill*, 3 G. Greene, 37; *Courtney v. Carr*, 6 Iowa, 238; *White v. Rittenmyer*, 30 Iowa, 268; Code, section 2922. The mortgage is a mere lien or charge on the land as security of the debt. *Newman v. De Lorimor*, 19 Iowa, 244; *McHenry v. Cooper*, 27 Iowa, 137. It is incident to

the debt, and upon the death of the mortgagee, being personal property, goes to the personal representatives, while the estate of the mortgagor, being real property, descends to the heirs. *White v. Rittenmyer*, *supra*. It can only be enforced by equitable proceedings. Code, section 3427; *Clough v. Seay*, 49 Iowa, 111. But the mortgagee obtains such an interest in real estate that he is a purchaser, within the meaning of the recording act. *Porter v. Greene*, 4 Iowa, 571; *Seevers v. Delashmutt*, 11 Iowa, 174; *Hewitt v. Rankin*, 41 Iowa, 35; *Koon v. Tramel*, 71 Iowa, 132; *In re Gill's Estate*, 79 Iowa, 296; *Weare v. Williams*, 85 Iowa, 253. It is well settled under the authorities that the mortgagee cannot maintain an action in ejectment against the mortgagor, but in some states it is held that, where the mortgagee obtains possession by any lawful means or enters therein with the assent of the mortgagor, without a definite time being fixed to continue therein, he may retain possession until his mortgage debt is paid. *Frink v. Le Roy*, 49 Cal. 314; *Roberts v. Sutherlin*, 4 Or. 219; *Packer v. Railway Co.*, 17 N. Y. 283; *Hennesy v. Farrell*, 20 Wis. 46; 3 Pomeroy, Equity Jurisprudence, section 1189. But lawful possession, as against the true owner, can only be obtained by his consent, expressed or implied. Surely, the mortgagor may place the mortgagee in possession, and thereby avoid the expenses of foreclosure; and if, in so doing, the duration of that possession is not limited, the intention that it continue until the debt is paid is the only reasonable, as it is the natural, inference to be drawn from the transaction. *Russell v. Ely*, 2 Black, 575; *Johnson v. Sherman*, 76 Am. Dec. 481; *Newton v. McKay*, 30 Mich. 380; *Morrow v. Morgan*, 48 Tex. 304. The possession is not by virtue of the mortgage, however, but the agreement of the parties to it. *White v. Rittenmeyer*, 30 Iowa, 268, is not opposed to this conclusion, as there, not the

rights of the mortgagee in possession, but the waiver thereof, was involved. The defendant entered into possession for the purpose of defeating the payment of the judgment he now owns. He obtained possession under a fraudulent conveyance, not an agreement, expressed or implied, to use the rents in satisfaction of a lien, but in order to defeat its enforcement. The title of the plaintiff was acquired in spite of the utmost opposition of the defendant, and in satisfaction of a judgment his conveyance was intended to defeat. In such a case there is no room for inference of consent.

2 The very opposite is shown. The mere assignment of the judgment to him did not change the status of the parties, and he acquired no right not possessed by his assignor. If the alleged analogy then be conceded, the defendant did not acquire the right to apply the rents in payment of his judgment. We have considered the case in line with the arguments, and must not be understood as holding such analogy exists, or that the rules relating to a mortgagee in possession have any application to the owner of a mere judgment owner similarly situated.

II. As the judgment constitutes no defense to the plaintiff's action for the rents, the motion to transfer to the equity side of the calendar was properly over-
3 ruled. It was immaterial whether plaintiff received the rents of the west one-half of the northwest one-fourth of section 33 after March, 1891, because he only asked recovery therefor up to that time.

III. As the defendant had ousted the plaintiff of possession, he was liable for the reasonable rental value of the land, and not merely for the
4 amount he received therefor. We find no error in the record, and the judgment must be affirmed.

AFFIRMED.

BANK OF MONTREAL, Appellant, v. HARVEY INGERSON.

Banks: COLLECTION AGENCY. A bank secured its indebtedness to a

- 1 creditor bank by putting up, as collateral, notes signed by third
- persons, and payable to and at debtor bank. The course of busi-
- 3 ness was that, when a note became due or was to be paid, it was
- sent for by debtor bank, and other notes sent in exchange therefor,
- 5 if necessary to protect the indebtedness. It was not shown that
- creditor bank ever directly authorized debtor bank to collect a
- note which had not been returned to it. *Held*, that the debtor
- bank had no authority to receive payment for notes in the hands
- of creditor bank.

SAME. The fact that notes are payable at a bank does not of itself, in
3-5 the absence of the notes, authorize the bank to collect anything
7 thereon before maturity.

SAME. A bank holding notes as collateral to be sent to debtor bank
3 for collection, and payable at a certain date, need not have the
5 notes in the hands of the collecting bank before the date fixed for
8 payment.

PAYMENT. A bank at which notes are made payable is not author-
3-5 ized after assigning the notes as collateral security to receive pay-
7-9 ment of the same before they are due, in the absence of the note.

SAME. A bank at which is made payable a note assigned by it as col-
3 lateral security under an agreement by which it is to receive pay-
5 ment of notes so assigned at their maturity and give other notes
as collateral, cannot bind its assignee by crediting on the notes
before maturity an amount previously deposited by the maker, in
such bank.

SAME. A bank at which a note is made payable has no authority to
3 bind one to whom it has assigned the note by receiving payment
5 on maturity of the note, where it has not received the note for
7-8 collection.

ESTOPPEL. A principal is not estopped to deny unauthorized acts of
4 its agent of which it had no knowledge.

Action: CONSOLIDATION Separate action on two notes against dif-
ferent makers and the same indorser are properly consolidated
1 where only the indorser is served and there is nothing to show the
plaintiff intends that the other parties shall be served.

Lazier v. Horan, 55 Iowa 75, overruled

Appeal from Woodbury District Court.—HON. GEORGE
W. WAKEFIELD, Judge.

WEDNESDAY, MAY 11, 1898.

ACTION at law to recover the amount due on two promissory notes. There was a trial by jury, and a verdict and judgment for the defendant. The plaintiff appeals.—*Reversed.*

Black & Goodwin and *J. S. Lothrop* for appellant.

Marsh & Henderson for appellee.

ROBINSON, J.—The plaintiff is a corporation of Canada, and is doing business in Chicago, in the state of Illinois. From the first part of the year 1888, until June, 1893, it transacted business with the Union Stock Yards State Bank of Sioux City, by lending to it from time to time money for which it gave to the plaintiff its certificates of deposit, secured by promissory notes, which it received in the course of its business. The notes in suit were taken by it, and sent to the plaintiff, as a part of the collateral security given on account of two certificates of deposit. The Sioux City bank failed on the tenth day of June, 1893, and this action is for the purpose of recovering of the defendant the amount due on the notes.

I. One of the notes was for five thousand dollars, and was made by D. N. Wheeler as principal and the defendant Ingerson as surety. The other note was for one thousand, four hundred and twenty-three dollars and fifty cents, and was made by T. E. Leeper as principal and the defendant Ingerson as surety. A
1 separate action was commenced on each note, in which the makers were named as parties defendant; but Ingerson was the only one who was served with

notice of either action, and he alone appeared in court. He filed an answer in each case, and then filed a motion to consolidate the two actions, which was sustained, and the two causes were thereafter tried as one. The appellant complains of the consolidation. Section 2734 of the Code of 1873 provided that, "whenever two or more actions are pending in the same court which might have been joined, the defendant may, on motion and notice to the adverse party, require him to show cause why the same shall not be consolidated, and if no sufficient cause be shown the same shall be consolidated." When the motion to consolidate was pending, the plaintiff did not make any showing in resistance, but merely excepted to the ruling and the order of consolidation. But the plaintiff claims that the actions should not have been consolidated, because each included a separate cause of action and a party who was not a party to the other action. To set out in a petition the name of a person as a defendant is not alone sufficient to make him a party to the action. The service of notice, or an appearance if there be no notice, is essential to give the court jurisdiction of the person named as a defendant. The actions in question were commenced and pending at the same time. It did not appear that the plaintiff intended to make any one but Ingerson defendant. As against him, the actions could properly have been joined, and no reason was shown why they should not be consolidated. Had Wheeler and Leeper entered an appearance in the action, and the cases had then been dismissed as against them, the cases could have been consolidated, under the rule of *Harwick v. Weddington*, 73 Iowa, 300. In the absence of a showing that the plaintiff intended to bring Wheeler and Leeper into court, the same rule applied, and the actions were properly consolidated.

II. During the progress of the trial in the district court, the plaintiff moved to strike from the files amendments to the answer filed by Ingerson. The amendments contained material averments, and the motion to strike was properly overruled.

III. Both notes were by their terms payable at the Union Stock Yards State Bank. The smaller one was payable on the tenth day of June, 1893, and the other was payable on the twenty-fifth day of the same month. Nearly four thousand dollars have been paid on the larger note, but the other one is wholly unpaid. They were sent to the plaintiff a considerable time before the failure, and, when that occurred, were in its possession. In the evening of the day before the failure, after banking hours, Ingerson and Leeper went to the Sioux

City bank, to arrange for the payment of the two
2 notes. Ingerson stated that there was to be a sale of cattle in Omaha the next day, and proposed that about one thousand, eight hundred dollars of the proceeds of the sale be placed to the credit of the Sioux City bank in some bank in Omaha, to apply in payment of the Wheeler note, and that the amount required to pay the remainder due on the Wheeler note, and the amount needed to pay the Leeper note, should be charged to his account the next morning. At that time he had a credit in the Sioux City bank sufficient to make the payments proposed. Mr. Skerry, president of the bank, told him that the notes were in Chicago, but would be sent for, and that he could leave the money required to pay them in the bank; and, when the notes were received, they would be canceled; that the bank would charge the amount required to pay them to his account, and cancel the notes. No check was given by Ingerson, but it was agreed that the amount required for the payment of the notes should be charged to his account in the books of the bank the next day. The

bank closed, however, before the entries were made. The Omaha deposit was made as agreed, and has been paid to the plaintiff, and is not in controversy. It is claimed by the appellee that the effect of his transaction with the Sioux City bank was to pay the remainder due upon the notes. The plan adopted and pursued respecting the collateral notes sent to the plaintiff was substantially as follows: The plaintiff received them with knowledge of the fact that they were payable at the Sioux City bank, and would be collected by it, and that some of them would be paid before they were due. It was the custom of the Sioux City bank to send for the notes before or at about the time they matured or were to be paid, and to replace them with other notes, so that the amount of collateral notes held by the plaintiff to secure a certificate of deposit should be kept good. The Sioux City bank collected all the notes, and sometimes received the amount due on such a note before it was due, and while it was in the possession of the plaintiff. The money so collected was not sent to the plaintiff, but when necessary to maintain the required amount of collateral notes, new notes were sent to the plaintiff. The collections were always made for the Sioux City bank. Mr. Skerry testifies that, when he arranged with the plaintiff to borrow money of it, he stated to it that the notes must be at his bank for payment; that some of them would be paid before they were due, and in such cases the Sioux City Bank "would send other paper, take the money from the farmers, and send it," to the plaintiff. This is the only evidence which we find in the record which can be claimed to show that the Sioux City bank was authorized to collect notes which belonged to the plaintiff; but when that statement is considered with other evidence, and with the course of dealing of the parties, it does not show that such collections were authorized. It is true that the plaintiff sent

to the Sioux City Bank collateral notes whenever they were requested; but, when that was done, new notes were sent with the request, in exchange for the notes to be returned, or a sufficient amount of collateral notes remained to secure the certificate of deposit, on account of which the notes returned had been held; hence, when collateral notes were returned, they became the property of the Sioux City bank, and were always collected as its property. It is not shown that the plaintiff ever authorized the Sioux City bank to collect a note which had not been returned to it. The evidence shows

4 that the plaintiff never made any objections to what the Sioux City bank did, but, as it is not shown that the plaintiff ever had any knowledge that money was collected by the Sioux City bank on notes which it had not received, the omission to make objections, if such collections were in fact ever made, is of no effect. Not only does the evidence not show that the Sioux City bank was in fact authorized to collect notes not in its possession, but it does not show that the plaintiff is estopped to deny that authority to do so was given.

So far as the evidence submitted shows, the authority, if any, which the Sioux City bank had to receive payment for the notes in suit on the ninth and tenth days of June, 1893, must be found in the notes. Each

5 of those was, by its terms, payable at the Sioux City bank on a date fixed; not "on or before" that date. The plaintiff was not under obligations to leave either note at the place of payment before the date fixed for payment. It may be said with some degree of plausibility, in view of the decision in *British & American Mortgage Co. v. Tibballs*, 63 Iowa, 468, that the agreement made by the defendant with Skerry would have been effectual to pay the note had the Sioux City bank been authorized to receive payment at the time the

agreement was made, and if it then had the money with which to make the payment; but the fact that the notes were made payable at the Sioux City bank did not, in the absence of the notes, under any permissible view of the law, authorize the bank to collect anything on either note before it was due; and it is at least doubtful if the evidence shows that the bank had the money with which to make the payment, although the defendant had an ample credit for that purpose. Conceding to the

6 defendant all that can be claimed from the evidence, it only shows that, on the ninth day of June, the Sioux City bank agreed to charge the defendant with an amount necessary to take up the notes, and to cancel the notes, or, in other words, to accept in payment of the notes a certain amount of the claim which Ingerson held against it for deposits he had made. Not only was the agreement not carried out, but the notes were payable in money only, and the bank had no right to accept in payment of the notes a claim against itself. *Bank v. Byrne*, 97 Mich. 178 (56 N. W. Rep. 355); *National Life Ins. Co. v. Goble*, 51 Neb. 5 (70 N. W. Rep. 503). The case of *British & America Mortgage Co. v. Tibballs*, *supra*, recognized that rule, but held that, as the bank in question in that case was paying all its certificates of deposit at the time it accepted one of its certificates in payment, it would have been a vain and unnecessary thing to draw the money on the certificate from the bank, and then pay it back to the bank. If the Sioux City bank was without money on the ninth and tenth days of June to make the payment required, the transaction which occurred would not have operated as a payment of either note; and, unless the bank was authorized to collect notes before they were received for collection, what was done, even if it be true that at that time the Sioux City bank had the necessary money,

would not have had the effect to pay the note due on the twenty-fifth day of June.

IV. If, in view of the fact that the transaction of June 9th was after business hours, it should be treated as of the tenth, when one of the notes became due; and, if the Sioux City Bank then had the money with which to pay that note, there arises the question: Did the Sioux City bank have authority to collect the note when it was due, although it had not been received for collection? The defendant, relying upon the case of *Lazier v. Horan*, 55 Iowa, 75, insists that the question must be

7 answered in the affirmative. That case does hold that, if a promissory note is made payable at a bank, payment made to the bank on the date of the maturity of the note is effectual as payment on it, although it is not at the time in the possession of the bank. It is to be noted that the case was decided with but limited time for the examination of the authorities, and that no authority was cited against the conclusion reached, and no adjudicated case exactly in point was cited in support of that conclusion, although reference was made to certain text-books. That case was referred to in *Callanan v. Williams*, 71 Iowa, 365; and, after citing *Adams v. Improvement Commission*, 44 N. J. Law, 638, this court said it was not disposed to extend the rule of *Lazier v. Horan*. We held in *Englert v. White*, 92, Iowa, 97, and *Klindt v. Higgins*, 95 Iowa, 529, that a person at whose office promissory notes were in terms made payable was not, by that fact, authorized to receive payments on them, although it appeared that he was in the habit of loaning money for others, and collecting from the borrowers and paying to the lenders money on account of loans he made. It is somewhat difficult to distinguish on principle between the right of a bank at which a note is to be

paid to act for the holder of the note in receiving payment and the right of an agent who is engaged in the business of negotiating loans which are made payable at his place of business, and who habitually collects payments made on such loans, to act for those to whom the payments were intended to be made. In view of the various decisions of this court, and because of the importance of having in all the states uniform rules for the regulation of commercial transactions, we feel justified in re-examining the rule announced in *Lazier v. Horan*. The conclusion in that case was based chiefly upon the statement as to the law made in section 228 of Story on Promissory Notes, as follows: "If, by such omission or neglect of presentment and demand, he [the maker or acceptor] has sustained any loss or injury,—as, if the bill or note were payable at a bank, and the acceptor or maker had funds there at the time which have been lost by the failure of the bank,—the acceptor or maker will be exonerated from liability to the extent of the loss or injury so sustained." It is no doubt true that, under some circumstances, the loss of money deposited in the bank where a bill or note was made payable might fall upon the owner; but, when that is the case, the deposit must have been made, not only for the benefit of the holder of the paper, but under such circumstances as to make the bank his agent, or to estop him to deny its agency. The rule is well settled, and was recognized in *Lazier v. Horan*,
8 that the acceptor of a bill of exchange, or the maker of a promissory note, payable at a bank or other specified place, is not required to present the bill or note at the place designated for payment, in order to recover in an action against the acceptor or maker. *Armistead v. Armistead*, 10 Leigh, 512. See, also, 3 Randolph Commercial Paper, section 1117. The effect of a failure to make such presentation and demand for

payment is to defeat the right of the holder to recover damages and costs in case the acceptor or maker had the money required to discharge the bill or note at the place designated for payment when the instrument was due. But in such a case, in order to avoid liability for damage, interest, and costs, it is necessary for the acceptor or maker, not only to maintain the tender, but to continue it in court. *Carley v. Vance*, 17 Mass. 389; *JWolcott v. Van Santvoord*, 17 Johns. 248; *Armistead v. Armistead*, 10 Leigh, 512; 3 Randolph Commercial Paper, section 1119.

The case of *Bank v. Zorn*, 14 S. C. 444, is sometimes referred to as sustaining the doctrine that money deposited at the place at which a bill or note is made payable at the time it is due will have the effect to discharge the note. It appears that a note was involved in that case which was by its terms made payable at the office of the payee, who was a cotton factor and commission merchant. The note was transferred by the payee to a bank to be held by it as collateral security, and, under some arrangement between the bank and the payee, was not presented for payment at the place of payment designated in the note. The maker had a balance with the payee at the time the note matured, sufficient to pay it; and, had it been duly presented, it would have been paid. The maker of the note afterwards affected a settlement with the payee, which included the note. That was not delivered at the time, but the payee agreed to procure it, and send it to the maker, but failed to do so. It was held that the note was discharged, although no specific reason was given for that conclusion. It may well have been based on the peculiar facts of the case, since it appeared that the payee of the note was authorized to make collections of notes which it had deposited as collateral security, and did so, but failed to apply the collections

in all cases in payment of the indebtedness for which the collateral notes were held as security. Had that been done, the note there in suit would have been paid. Some authorities were cited with reference to demand for payment, and something was said on that branch of the case to the effect that if the money was deposited "according to the terms of the note," and was lost because of the failure of the holder to demand payment, the loss would be on him. Although the case is in principle clearly distinguishable from *Lazier v. Horan*, yet it tends to support that case. The same is true of something said by one of the three judges who gave opinions in *Rhodes v. Gent*, 5 Barn. & Ald. 244; but the point was not involved in the case. In *Palmer v. Hughes*, 1 Blackf. 328, it was held that demand for the payment of a note payable at a specified place was necessary before an action could be maintained upon it against the maker; but the rule stated was contrary to the weight of authority, and was changed in Indiana by statute. See *Glatt v. Fortman*, 120 Ind. 384 (22 N. E. Rep. 300). It was said in *Caldwell v. Evans*, 5 Bush, 380, that "the making of a note payable at a bank does not of itself constitute such bank an agent of the payee to receive the money, but it is a mere designation of a place where both the paper and the funds to take it up will be on the day it is due. Therefore, to make the bank the payee's agent, either the paper must be indorsed to or deposited with it." The case of *Adams v. Improvement Commission*, 44 N. J. Law, 638 reviews the authorities at considerable length, and is unusually well considered. The conclusion reached by the court is stated as follows: "The contract of the maker, acceptor, or obligor is to pay the holder of the paper, and the place for payment is designated simply for the convenience of both parties. * * * If maturing paper be left with the banker for collection, he becomes the

agent of the holder to receive payment; but, unless the banker is made the holders's agent by a deposit of the paper with him for collection, he has no authority to act for the holder. The naming of a bank in a promissory note as the place of payment does not make the banking association an agent for the collection of the note or the receipt of the money. No power, authority, or duty is thereby conferred upon the banker in reference to the note, and the debtor cannot make the banker the agent of the holder by simply depositing with him the funds to pay it with. Unless the banker has been made the agent of the holder by the indorsement of the paper or the deposit of it for collection, any money which the banker receives to apply in payment of it will be deemed to have been taken by him as the agent of the payor." In *St. Paul National Bank v. Cannon*, 46 Minn. 95 (48 N. W. Rep. 526), it appeared that money due on a note which was payable at a certain bank was deposited in the bank at the maturity of the note, with directions to pay it. The court said: "Although the note was by its terms payable at the Bank of Minnesota, the mere depositing the money in that bank, in order that it might be applied in payment of the note, did not constitute a payment of it. In such a case the bank receiving the money is to be regarded as the agent of the person paying it, the holder of the note not having deposited it at the designated place for collection or payment. The law is well settled." In *Hills v. Place*, 48 N. Y. 520, a question arose as to the payment of a note which was made payable at a specified bank, and it was said: "The bank was in no sense the plaintiff's agent for the collection of the note or the receipt of the amount due thereon, or otherwise. It was named in the connection in which it was used merely as the place where its business was transacted for the purpose of making payment of the note there, without conferring

or intending to confer any power, authority, or duty on the association itself in reference thereto." The rule of these cases finds abundant support in the authorities. See *Cheney v. Libby*, 134 U. S. 68 (10 Sup. Ct. Rep. 498); *Ward v. Smith*, 7 Wall, 447; *Williamsport Gas Co. v. Pinkerton*, 95 Pa. St. 62; *Wood v. Trust Co.*, 41 Ill. 267; *Grissom v. Bank*, 87 Tenn. 350 (10 S. W. Rep. 774); *Turner v. Hayden*, 4 Barn. & C. 1; *Walton v. Henderson*, Smith (N. H.) 168; 1 Daniel. Negotiable Instrument, sections 325, 326; 3 Randolph Commercial Paper, section 1119; Tiedeman Commercial Paper, p. 539, section 310; 3 Am. & Eng. Enc. Law (2d ed.), 803; 18 Am. & Eng. Enc. Law, 199.

A careful examination of the authorities shows that the case of *Lazier v. Horan* is almost alone in holding that payment of the amount due on a promissory note to the bank designated therein as the place of payment, at the maturity of the note, will be effectual as a payment of it. The great weight of authority is against that rule, and we are constrained to say that it does not appear to us to be well founded in reason. The specifying, in a bill or note, of a place for its payment, is for the convenience of the parties to it, and does not alone create an agency in the person who does business at the designated place to receive money for the holder of the paper. It may be necessary to demand payment at the designated place to aid in fixing the liability of the drawer or indorsers. Byles. Bills (7th ed.) 219; Tiedman Commercial Paper, section 310. But that is not necessary to fix the liability of the acceptor or maker, and, as to him, the paper merely does what it purports to do; that is, it designates a place where payment may be made, not a person other than the holder to whom it may be made. The effect of the conclusion we reach is to overrule so much of the case of *Lazier v. Horan* as is not in harmony with what we have

said. In the case of *Wolford v. Young*, 105 Iowa, *post*, it was found that the company which transacted business at the place of payment designed in the note was the agent of the holder, and the case is not in conflict with anything we have said in this case. The evidence fails to sustain the judgment of the district court, and it is REVERSED.

ORLANDO GRIFFITH V. FIELDS & BRYANT, Appellants.

Principal and Agent: AUTHORITY. An agent of sellers of fruit trees employed by them in delivering trees, "making settlements with the purchasers" and taking notes therefor has authority at the time of taking a note for the purchase price of trees to enter into 1 an agreement with the purchaser that his principal shall plant the trees and care for the same for four years, replacing all that die within that time, although the order for the trees stated that the entire contract was printed therein and that all trees failing to grow "the first year" were to be replaced free of charge. Such an agreement is merely a completion or the original contract.

Judgment: RES ADJUDICATA. A judgment against the maker or a note given for the purchase price of fruit trees, in an action by an assignee of a note in which the defense that such an assignee was not an innocent holder is set up as well as a claim that the seller 3 of the trees to whom the note was made payable broke his agreement to set the trees, care for them for four years and replace all that die during such time, is not conclusive in a subsequent action by the purchaser against the seller for breach of such contract.

Contracts: CONSIDERATION. An agreement which is merely a completion of a former contract may be supported by the same consideration.

Appeal from Taylor District Court.—HON. H. M. TOWNER, Judge.

THURSDAY, MAY 12, 1898.

ACTION for damages for a breach of contract to furnish, set, and care for trees. The cause was submitted to the court without a jury, who gave judgment for the plaintiff, and the defendant appealed.—*Affirmed*.

105	362
136	44
j136	49
j136	50
j136	52

Jackson & Miller for appellant.

Crum & Haddock for appellee.

GRANGER, J.—I. In May and June, 1894, the plaintiff gave two orders to defendant for trees to be delivered in the fall of that year. The orders were silent as to who should set out and care for the trees, but they were to be paid for on delivery, the amount of the orders being two hundred dollars. The orders were taken by one Gudgel and one Hoy, who was also an agent for defendant to deliver trees and make settlements with purchasers. The facts are mainly stipulated, and by a stipulation it is made to appear
1 that when the orders were taken, in May and June, 1894, the agreement was that the trees were to be set out, pruned, and cared for by the defendant for four years, and all trees that failed to grow were to be replaced. In substance, the agreement was that defendant was to make plaintiff an orchard, and the two hundred dollars was regarded as compensation therefor, being more than the value of the trees without such work. When the trees were delivered, plaintiff refused to give his note until they gave him a contract to care for the trees as had been agreed upon. The agent, Hoy, then gave to plaintiff the contract on which this suit is brought, as follows: "We agree to oversee planting of trees, and trim and prune and care for four years. Replace all that die for four years. Fields & Bryant, per Hoy." Upon the delivery of the agreement, plaintiff gave his note for one hundred and ninety dollars, the other ten dollars having been paid by securing another customer for defendant; and the note was transferred to one Fogarty, who brought suit thereon, and recovered judgment for the amount of it. Plaintiff then instituted this

suit on the written contract to set out and care for the trees, claiming a breach thereof, and asking damages. Some defenses were pleaded that will be noticed.

II. The following is a provision of the orders given for the trees: "It is agreed that the entire contract is printed and written hereon, and that no verbal agreement or alteration in the printed matter of this contract is binding, and I agree not to countermand this order; all trees that fail to grow the first year to be replaced free of charge." It is now urged that Hoy had no authority to execute the agreement sued on, to conform to the original understanding. Considerable space is devoted to stating the rule as to persons dealing with agents, and that they must take notice of the agent's authority, and on whom rests the burden of proof that we think need not be considered. A part of the facts in this case are stipulated, and among them is one as to the agency of Hoy, as follows: "It is also agreed that Hoy, the party representing the defendants in making the written contract for defendants, was an agent of defendants, employed by them in delivering trees and in making settlements with the purchasers of trees, and taking notes therefor." Counsel are not agreed as to what is meant by the words "making settlements with purchasers of trees." If these words were omitted, it seems to us the authority of Hoy would be just what appellant thinks it is. He would then have the right to deliver trees and take notes for them; that is, adjust the amounts due under the contract, and take notes therefor. It is true that such adjustments are settlements in a proper sense; but we think the term "settlement" authorized Hoy to do the things necessary to entitle the defendant to a note for the trees delivered in accordance with the original contract. It is practically stipulated that the facts were, at the inception of the contract, as plaintiff states them, and that they were not expressed in the written

orders. It would be an exceedingly arbitrary and unjust rule that would construe the authority to Hoy, as to settlement, in a way that he could not correct a conceded omission; that is, not to make a new contract, but complete the one already made, so that its terms should be in writing, as they should have been at first. This construction must be in harmony with the intention of the defendant firm, in its authority to Hoy, if it was honest; and, if dishonest, it is entitled to little consideration. We are not in doubt that the contract on which suit is brought was made by authority.

2 This conclusion is decisive of another question argued,—that the contract executed by Hoy is without consideration. If but the completion of a former contract, it has the original consideration for its support.

III. The note given for the trees was sold to one Fogarty, who brought suit thereon against plaintiff, and in that suit plaintiff pleaded that Fogarty was not an innocent holder of the note, and the issues were such that the court instructed the jury that if Fogarty was not an innocent holder of the note, and damages were sustained by the plaintiff, it might offset the same from the amount of the note. In that case there was a

3 verdict and judgment for Fogarty for the full amount of the note. In that case Fields & Bryant was notified of the defense to the note by Griffith, and the firm appeared and aided Fogarty in resisting Griffith's claim. It is now urged that because of the proceedings in that case, the question involved in this is *res judicata*. The general rules as to estoppel by judgment are quite well and definitely settled. In a case like this the rule is stated in *Goodenow v. Litchfield*, 59 Iowa, 226; as follows: "The rule, as appears to be well stated by all the authorities, is that, where a former judgment or decree is

relied upon as a bar to an action, it must appear either by the record or by extrinsic evidence that the particular matter in controversy, and sought to be concluded, was necessarily tried and determined in the former action." The case cites *Packet Co. v. Sickles*, 5 Wall. 580, and *Miles v. Caldwell*, 2 Wall. 35. See, also, *Lindley v. Snell*, 80 Iowa, 103. We think there is no doubt that the same facts were at issue in the two cases, but instead of it appearing in the other case that the issue as to the breach of contract was determined, it seems quite clear that it was not. The burden is with the defendant in this case to make it appear that the issue was determined. See authorities above cited. Before such an issue would become material in the other case, it must appear that Fogarty was not an innocent holder of the note. If an innocent holder, his right of recovery would not be subject to the damages pleaded. It appears that he did recover the amount of the note. There is nothing to indicate that such recovery was on any ground other than as an innocent holder of the note. Without question there were two issues presented in that case. The most that could be said in appellant's favor is that it does not appear on which issue the result was reached. Considering such a state of facts, it is said in *Russell v. Placc*, 94 U. S. 606: "If there be uncertainty on this head in the record,—as, for example, if it appears that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined." The same language is quoted in *Lindley v. Snell*, *supra*. The rule is conclusive against appellant's contention in this case. The judgment is AFFIRMED.

EMMA I. CARMAN v. WILLIAM MOSIER AND ELIZABETH
MOSIER, Appellants.

Life Tenant: LEASE FROM. The lessee of land from a life tenant has no further right of occupation where the lessor dies when there are no growing crops.

Appeal from Fremont District Court.—HON. N. W.
MACY, Judge.

THURSDAY, MAY 12, 1898.

SUIT in equity to recover for the use and occupation of land, to restrain the defendants from selling or removing the crops growing thereon, and to establish a lien for the amount of the judgment upon said crops and the other personal property used upon the premises. The defendants pleaded that they rented the land from a life tenant for the year beginning March 1, 1896, and ending March 1, 1897, upon condition that they support, feed, clothe, and care for the said tenant, who was old and helpless; that they thereupon entered upon the use and occupation of the land, grubbed it out, and prepared it for cultivation as best they could; that after they had taken possession, and on or about April 11, 1896, the life tenant died. They therefore denied plaintiff's right to recover for use and occupation of the land. The case was tried upon an agreed statement of facts, resulting in a judgment and decree finding that plaintiff was entitled to one-half the corn grown upon the land. Defendants appeal.—*Affirmed.*

W. E. Mitchell for appellants.

William Eaton for appellee.

DEEMER, C. J.—Appellee is, and has been for many years, the owner in fee simple of the land occupied by the defendants. Sarah Schutter, the mother of appellee and of appellant, Elizabeth Mosier, was possessed of a life estate in these lands from June, 1888, to the date of her death, April 11, 1896. Appellant, William Mosier, the husband of his co-defendant, rented the premises from the life tenant for the year beginning March 1, 1896, agreeing for the use thereof to clothe, board, and care for the life tenant during the term of the lease. Mosier entered into possession of the premises, hauled manure, and prepared the land for seeding prior to the death of the life tenant, and thereafter raised a crop of corn thereon. Appellants were at all times ready and willing to comply with their contract, and furnish their lessor as agreed, provided she would live with them, but for some reason,—not due to any fault of appellants, however,—she was cared for by other parties until her death, in April. Emma Carman and Elizabeth Mosier are the sole and only heirs and personal representatives of the life tenant.

These are the material facts gathered from the agreed statement, and it need only be added that the parties also agreed that, if the court found plaintiff entitled to recover, she should have one-half of the corn grown upon the premises or the value thereof, to be protected in the manner as finally decreed by the trial court.

In order that appellee may recover, she must show that, as owner of the reversion, she is entitled to compensation for the use and occupation of the land, or that as an heir, or as one of the personal representatives of the deceased life tenant, she is entitled to some part of the rent reserved. It will be observed that the consideration for the lease was an agreement to support the lessor during the term of the lease, and that appellants

performed their obligation, so far as they were able to do so. Now, it is probably true that the death of the lessor relieved them of any further obligation as to her. But this conclusion by no means settles the controversy, for the general rule seems to be that upon the death of a tenant for life all interest of his lessee ceases. *Page v. Wright*, 14 Allen, 182; *Hoagland v. Crum*, 113 Ill. 365; *Peck v. Peck*, 35 Conn. 390; 1 Washburn, Real Property (3d ed.) p. 105. Such lessee has no greater rights than his lessor, and the estate acquired by him is subject to be defeated by the death of the tenant for life. A tenant for life, or any other tenant whose estate is of uncertain duration, has the right to emblements. These are defined to be the profits which the tenant of an estate is entitled to receive out of the crops which he has planted, and which have not been harvested, when his estate terminates. Under this term are included, as a rule, only such products of the soil as are of annual growth and cultivation. In the case of *Reilly v. Ringland*, 39 Iowa, 106, it is said: "It is a broad and almost universal principle that the tenant who sows a crop shall reap it, if the term of his tenancy be uncertain. In order to entitle a tenant or his executor or administrator to emblements, his tenancy must be uncertain in its duration. In the next place, the tenancy must be determined by act of God. One of the important rights of a tenant for life is this right to emblements or profits of the crop which the law gives him, or his executor, if he be dead, to compensate for the labor and expense of tilling and sowing the land." In the case before us the tenancy was terminated by act of God, but it does not appear that the life tenant, or his lessee, had planted any crops at the time the estate terminated; and, as the right to emblements seems to be based upon the sowing or planting of the crop, the tenant had no right to use and occupy the land under his lease. If the estate is

terminated before the seed is actually sown, there will be no right of emblements. Nor can the cost of preparing the ground for the reception of the seed be recovered. *Lane v. King*, 8 Wend. 584; *Price v. Pickett*, 21 Ala. 741; *Thompson's Adm'r v. Thompson's Ex'r*, 6 Munf. 514; *Gee v. Young*, 2 N. C. 17. As appellants had not planted the corn which they now seek to hold under the rule relating to emblements, their estate terminated with the death of their lessor, and they are liable to the reversioner or remainder-man for the use and occupation of the premises. The rule at common law seems to have been that the reversioner was entitled to the entire rent, but this was cured by statute (Code 1873, section 2011), which provides for the apportionment of the rent. See, also, Code, section 2988. As the parties have agreed, however, upon the amount of the recovery, we have no occasion to construe this section, or to attempt to apply it to the facts of this case. The mere fact that appellants have paid the rent for the full term is not controlling. Their estate was liable to be extinguished at any time by the death of their lessor, and when so extinguished they had no further right of occupation, unless to reap what they had sown. As they had sown nothing, they became liable for use and occupation during the remaining period of the lease. The judgment of the trial court is right, and it is **AFFIRMED**.

WOLD & OLSON V. LAURA D. BERKHOLTZ, Defendant, and
F. E. BARBER, Guardian, and CORA and BESSIE
BERKHOLTZ, Intervenors and Appellants.

Descent and Distribution: DOWER: *Election*. The inference of an election by a widow to retain the homestead for life instead of taking her distributive share under the statute, arising from her
1 occupation of the homestead with her minor children as a home
for more than ten years, is overcome by proof of a contrary elec-
2 tion solemnly asserted in a suit for contribution instituted by the

106	370
107	286
108	370
109	707
110	370
111	300

guardian of the heirs and continually evidenced by leasing and demanding and receiving the rents of the distributive share and bearing its portion of the burden during all such time as to taxes and improvements.

Application for Dower: TIME FOR MAKING. A widow occupying a homestead for more than ten years after her husband's death is not precluded from asserting her right to dower, which she has
8 elected to take in lieu of homestead, by Code of 1873, section §369, which limits the time within which application for dower may be made to ten years; since the remedy therein provided is not exclusive.

Appeal from Lyon District Court.—HON. GEORGE W. WAKEFIELD and HON. JOHN F. OLIVER, Judges.

THURSDAY, MAY 12, 1898.

THESE three cases were submitted together, and on the same record. The first was tried before Hon. George W. Wakefield. Wold & Olson asked for judgment on account against Laura D. Stoltenberg, and the petition was aided by a writ of attachment levied upon the distributive share of the defendant in the estate of Herman Berkholtz, deceased, and rents thereon, duly garnished. In her answer defendant denies the indebtedness. Cora and Bessie Berkholtz and their guardian intervened, alleging that Mrs. Stoltenberg elected to take the homestead in lieu of her distributive share, and that the property attached belonged to them. Decree was entered in favor of the plaintiff for the sum of two hundred and twenty-three dollars and forty-one cents, and the court found Mrs. Stoltenberg did not elect to take the homestead, established a claim of forty-seven dollars for repairs made by guardian as a first lien, a judgment in favor of interveners as a second, and ordered the property sold subject thereto in satisfaction of plaintiff's judgment. The interveners appeal.—*Affirmed.*

E. C. Roach for appellants.

McMillan & Dunlap for appellees.

THE second action was begun by interveners in the first against Mrs. Stoltenberg to quiet title against her on the ground that she had elected to take the homestead, and was not entitled to any interest in the remaining property. This was consolidated with the third action, in which the interveners asked that G. W. Gleason, a judgment creditor of Mrs. Stoltenberg, and the sheriff be enjoined for the same reason from levying or enforcing an execution against the property. This cause was heard by Hon. John F. Oliver, and a decree entered granting the relief prayed. The defendants appeal.—*Reversed.*

J. M. Parsons for appellants.

E. C. Roach for appellees.

LADD, J.—The controlling question in each of the three cases is, did Laura D. Stoltenberg (formerly Berkholtz) elect to take the homestead in lieu of her distributive share in the estate of Herman Berkholtz, deceased? Berkholtz died June 11, 1894, seized of the south one-half, southeast one-fourth, southwest one-fourth, and the northeast one-fourth, southwest one-fourth, of section 33, in township 100 north, of range 45 west of fifth principal meridian, and lots 1, 2, 3, and 4 in block No. 1, and lots 2, 3, 4, and 5 in block No. 2, of Berkholtz addition to the town of Rock Rapids. Situated on this property was a flouring mill, operated by water, and a valuable mill site, one tenement dwelling house, and also that occupied by the deceased and his family. The premises so occupied consisted of nearly two acres lying just north of block 2, and were inclosed

by a fence. The barn used in connection therewith stood adjoining the inclosed tract on the north, but was included in the plat and survey. Berkholtz left surviving him his widow, Laura D. Berkholtz, since intermarried with Thomas Stoltenberg; a son, W. E. Berkholtz; and two daughters, Cora and Bessie Berkholtz. W. E. Berkholtz, having arrived at the age of majority, conveyed all his interest in the estate to his sisters, April 21, 1894. Laura D. Berkholtz and her children continuously occupied the premises referred to, with one-half of the barn, as a homestead, up to June 23, 1894, when she married Stoltenberg and moved to Illinois. While the children resided with their mother, the guardian paid for their board, clothing, and the expenses of their education. The mill, with one-half of the barn, has been rented since the death of Berkholtz, written leases therefor being executed by the guardian and widow jointly. A portion of the land has been rented for pasture, and the tenement house leased to various persons. The widow has received one-third of the rent of the mill and other real estate; and one-third of the cost of repairs and improvements, and also of the taxes, has been paid by her, or charged to her by the guardian in his account with her. A small piece of land was condemned at one time for the public use, and she received one-third of the compensation. In 1887 the guardian brought an action against the widow to compel her to contribute one-third the cost of necessary repairs, alleging her ownership of one-third of the mill property. This was admitted by the widow in her answer, and judgment rendered against her for the amount claimed. She has never paid or been charged any rental for the use of the homestead. These facts are found in the stipulation of the parties, or are established by the undisputed evidence. They show, not only that Mrs. Stoltenberg did not intend to take the homestead in lieu of her

distributive share, but that the heirs and their guardian were so advised. She and they have acted throughout on the theory that the children were owners of two-thirds of the estate and the widow of one-third. The only circumstance indicating a contrary intention is the continuous occupancy of the homestead for a few days more than ten years. Unless this is treated as conclusive proof of an election, she is entitled to her distributive share.

The right to the distributive share is primary under the statute, and an election is necessary in order to retain the homestead for life. *Egbert v. Egbert*, 85

Iowa, 534; *Wilcox v. Wilcox*, 89 Iowa, 2 393; *Stephens v. Hay*, 98 Iowa, 37. Pos-

session of the homestead for longer than a reasonable time within which to make an election after the lapse of one year, during which claims may be filed against the estate, without other evidence, may well be deemed an election to take it for life. But when, as in this case, it is occupied by the survivor and her minor children as a home even for more than ten years, the inference of an election is overcome by proof of a contrary election solemnly asserted in a suit for contribution, instituted by the guardian of such heirs, and continually evinced by leasing, and demanding and receiving the rents of the distributive share, and bearing its portion of the burdens during all this time. In *Conn v. Conn*, 58 Iowa, 747, relied on by interveners, the survivor was in possession over ten years, but it is there said: "The only thing which tends to evince that the occupancy of the homestead should not be regarded as an election is the execution of the mortgage, but this was not executed until more than ten years after the death of Robert Conn." The survivor in *McDonald v. McDonald*, 76 Iowa, 137, occupied the homestead for about five years, and though, at the end of three years, she had executed a mortgage on one-third of the estate, she was

held to have elected to take the homestead for life. In other words, the mere execution of a mortgage covering the distributive share will not overcome the presumption of an election to retain the homestead arising from long-continued possession. See, also, *Zwick v. Johns*, 89 Iowa, 550. After reviewing previous decisions, this conclusion is reached in *Egbert v. Egbert*, *supra*: "When the survivor has occupied after a reasonable time without having the distributive share set apart or otherwise making an election, the presumption of an election from the occupancy arises, and the rule applies; otherwise it does not." In *Wilcox v. Wilcox*, *supra*, the widow was held to have elected to take the distributive share, and this language is pertinent: "It does not follow from the language of those sections, nor the holdings thereunder, that an election may not be made to take the distributive share before it is actually set off. In the *Egbert Case*, as well as others, the thought is prominent that the right to the distributive share is primary, that the election should be as to the homestead, and that a right to the distributive share is only defeated when a homestead election is made; but, of course, there may be an act indicating an election to take the distributive share, and that is what is meant when the term is used, and not that such an election is necessary to secure it." The assertion by the widow of her ownership of a distributive share in the suit for contribution was a clear and unequivocal election on her part to take that instead of the homestead. It involved a liability which she could have avoided by taking the latter. Since then she has enjoyed the profits it might yield, and exercised such dominion over it as would be lawful by a tenant in common. The occupation of the homestead was not inconsistent with this claim of one-third of the estate. It was used by the children as well as by the widow for a home. As said in *Stephens v. Hay*, *supra*:

"It was natural, and to be expected, that she and the children would occupy the homestead together after the death of the husband and father." No one has
3 been prejudiced by the delay in having her distributive share set apart. While the time within which she may do so under section 3369 of the Code has elapsed, the remedy there provided is not exclusive. *Starry v. Starry*, 21 Iowa, 254; *Thomas v. Thomas*, 73 Iowa, 657. As the defendant does not question the levy of the writs on her dower interest before assigned (*Rausch v. Moore*, 48 Iowa, 611), the interveners may not do so for her. The decree in the action brought by Wold & Olson is *affirmed*, and that in the cases consolidated is REVERSED.

H. N. MOORE & COMPANY v. J. S. HORTON, E. S. FERGUSON
AND T. J. BAKER, Appellants.

Appeal: GRANTING OF NEW TRIAL. An order granting new trial will not be set aside on appeal, unless it affirmatively appears that the discretion of the court has been abused.

SAME. Where the special finding, of the jury sustain the defenses pleaded by defendant, a motion for a new trial by plaintiff should be refused.

Appeal from Woodbury District Court.—HON. SCOTT M. LADD, Judge.

THURSDAY, MAY 12, 1898.

ACTION to recover judgment in the sum of two thousand, nine hundred and twenty-five dollars and sixty-nine cents, with interest and attorney's fees, upon a promissory note executed by the defendants to the plaintiff. The defendants each admitted the execution of said note. The defendants J. S. and Alice Horton, answering for themselves, allege that said note is

usurious, and, by way of counterclaim, state a cause of action for wrongful and malicious suing out of the attachment issued in this action against their property. They allege that about the time of the levy of said writ they had an opportunity to sell the land upon which it was levied to a purchaser, who was ready, able, and willing to purchase the same, and that they were prevented from selling said land by reason of the levy of said writ of attachment; that the land has depreciated in value since said levy in the sum of one thousand, five hundred dollars, which amount they ask to recover as actual damages, and for three thousand dollars as exemplary damages. The defendant Furgason, answering separately, makes the same allegations with reference to usury as the defendants Horton, and, as a further defense, alleges that his signature to said note was procured by fraud and concealment, in that the plaintiff represented to him that the note sued on settled all of J. S. Horton's indebtedness to plaintiff, when in fact he knew that Horton was indebted to plaintiff over one thousand dollars upon another note, on which this defendant was surety. Defendant Baker, answering separately, makes the same allegations with reference to usury as the defendants Horton, and, as a further defense, says that his signature to said note was secured by fraud and concealment, in that it was represented to him that the note sued on settled all J. S. Horton's indebtedness to plaintiff, when in fact there remained an additional indebtedness of over one thousand dollars. He also alleges that plaintiff fraudulently concealed from him that J. S. Horton was in default as school treasurer, and that the amount procured by the note sued on was to cover the amount or part thereof for which he was in default. Plaintiff, in reply to the answer of the Hortons, admitted the issuance and levy of the writ of attachment, but denied that the same

was wrongfully or maliciously issued, or that said defendants were damaged thereby, and alleged that he acted upon advice of counsel in suing out said attachment. The case was tried to a jury, and the following special findings returned: "Did the plaintiff and J. S. Horton agree that Horton should pay a higher rate of interest than eight per cent. per annum on the two thousand, eight hundred dollars covered by the note sued on, for the four months from October 5, 1894, to the maturity of said note? Answer. No. Did J. S. Horton in fact pay, himself, as interest on the note sued on, prior to its maturity, more than seventy-four dollars and sixty-seven cents, as interest; and, if so, how much did said Horton in fact pay plaintiff as interest thereon for such time? Answer. No. Was the writ of attachment sued out maliciously; and, if so, what amount, if any, do you allow the defendants J. S. and Alice Horton as exemplary damages on their counterclaim? Answer. Yes; six hundred dollars (\$600). Was the defendant Furgason induced by fraudulent representation of the plaintiff to sign the note sued on as surety? Answer. No. Was the defendant Baker induced to sign the note sued on, as surety, by the plaintiff fraudulently concealing from said Baker the matters as alleged by him? Answer. Yes. Samuel Krummann, Jr., Foreman." Plaintiff filed a motion in arrest of judgment, and for a new trial, upon seventeen separate grounds stated in the motion. This motion was sustained, and from that ruling the defendants appeal. *Reversed* as to defendant Baker, and *affirmed* as to the others.

Wright, Call & Hubbard, George W. Argo and T. F. Bevington for appellants.

Marsh & Henderson for appellees.

GIVEN, J.—This court has many times, and uniformly, held that the granting of a new trial rests largely in the discretion of the trial court; that ordinarily that court has better opportunity to pass upon the questions involved in a motion for new trial than the appellate court, and that, therefore, the appellate court is more reluctant to disturb an order granting the new trial, than when refusing it; that while this is a legal and not an arbitrary discretion, yet an order granting or refusing a new trial will not be set aside by the appellate court unless it be shown affirmatively that the discretion has been abused. Plaintiff's motion for a new trial was sustained generally, and therefore, if any one of said grounds is sufficient to warrant the ruling, the action of the court must be sustained. *Wightman v. Butler County*, 83 Iowa, 691. We think that, except as to defendant Baker, the motion might well have been sustained upon either of several grounds stated therein, and especially upon the ground that the damages allowed on the counterclaim are excessive. The special finding as to the defendant Baker fully sustains the defenses pleaded by him, and therefore, as to him, no new trial should have been granted. For this reason the judgment granting a new trial as to defendant Baker is reversed, and as to the other parties to the action it is **AFFIRMED**.

JOHN N. BALDWIN, Trustee, v. THE GERMAN INSURANCE
COMPANY OF FREEPORT, ILLINOIS, Appellant.

105	379
113	315

JOHN N. BALDWIN, TRUSTEE, v. THE NEW HAMPSHIRE
FIRE INSURANCE COMPANY, Appellant.

Insurance: INCUMBRANCE: *Forfeiture*. Under a provision in a fire 1-2 insurance policy that if the property is incumbered it must be so 4-5 represented to the company, and expressed in the policy in writ-

6 ing, or the contract shall be void, the failure to inform the insurers of the existence of a mortgage renders the policy void.

VACANCY. A provision in a fire insurance policy that the policy should
1-2 be void and inoperative during the time the premises remain
4 5 vacant, without the assent of the insurers, is valid, and during
6 such time the policy is rendered void.

REVIVAL OF POLICY: *Consideration.* Where a fire insurance policy
3 is rendered void by reason of a violation of its provisions, it is not
7 revived by attaching thereto an agreement for the benefit of the mortgagee, without a new consideration therefor.

Appeal from Pottawattamie District Court.—HON. A. B.
THORNELL, Judge.

THURSDAY, MAY 12, 1898.

ACTION at law to recover amounts alleged to be due on two fire insurance policies. The actions, by agreement of parties, were tried and submitted together. A jury was impaneled to try the issues presented by the pleadings, and when the evidence had been fully submitted the district court directed a verdict for the plaintiff in each case for the amount of the policy involved therein, with interest, and judgments were rendered upon the verdicts. The defendants appeal.—*Reversed.*

McVey & McVey for appellants.

Wright & Baldwin for appellee.

ROBINSON, J.—The policies in suit were issued in April, 1891, and each purported to insure MacConnell & Greene against loss or damage by fire to the amount of one thousand dollars on their warehouse, office, and barn, and two hundred and fifty dollars on their lime house, all situated on certain lots in an addition to Council Bluffs, for the term of five years. On the twenty-fifth day of January, 1893, local agents of the companies made indorsements upon or additions to the

policies which purported to transfer the insurance from the lime house to the warehouse, office, and barn, and thus to increase the insurance on the property last described, for which each policy provided, to one
1 thousand two hundred and fifty dollars. On the thirteenth day of July, 1894, there was attached to each policy a mortgage clause, which provided, in terms, that any loss or damage which should arise under the policy should be payable to the plaintiff as trustee for the Council Bluffs Savings Bank. Two weeks later the property insured was destroyed by fire. These actions were brought to recover the amounts which the policies purport to insure.

The property insured is now, and has been since February, 1889, owned by S. P. MacConnell and M. T. Greene, and they constitute the firm of MacConnell & Greene. In the year 1888, MacConnell purchased the lots upon which the buildings destroyed were situated, and the buildings were erected thereon by the firm. In February, 1889, MacConnell conveyed an undivided one-half of the property to his partner, and in December, 1890, gave to him a quitclaim deed, which was also for an undivided half of the property. It appears, however, that one of the deeds was executed by mistake, and that each partner owned an undivided one-half of the property when the policies were issued and at the time of the fire. When MacConnell purchased the property, and before he conveyed any interest therein to Greene, he executed to John N. Baldwin a mortgage on the property to secure the payment of two thousand one hundred and thirty-seven dollars and fifty cents, and that mortgage has never been satisfied, nor has the mortgage debt been paid. On the twenty-second day of July, 1891, MacConnell & Greene executed to the plaintiff a trust deed, which included the property in question, and was designed to secure the payment of forty-seven thousand dollars, which have not been paid, and

his interest in the policies in suit is derived from that deed and the mortgage clause attached to each policy. On the twenty-third day of July, 1893, the property insured became vacant, and remained vacant continuously until destroyed as stated.

The policies do not appear to have been issued upon written applications. The policy of the German Insurance Company contained the following: "(2) * * *

If the property above described is incumbered in any manner, it must be so represented to the company, and expressed in this policy in writing; otherwise this insurance contract shall be void and of no effect. * * *

"(5) When property insured by this policy * * * shall in any manner become incumbered * * * without the consent of the company indorsed hereon, * * * this policy shall at once cease to be binding against this company. * * *

"(15) This policy shall not cover unoccupied buildings, and, if the premises insured shall be vacated without the consent of this company indorsed hereon, * * * this policy shall cease and determine."

3 The mortgage clause attached to the policy contained the following: "Loss or damage, if any, under this policy, shall be payable to John N. Baldwin, trustee for Council Bluffs Savings Bank, as its mortgagee (or trustee), as interest may appear; and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property. * * *

The Hampshire Fire Insurance Company contains the following: "This policy shall be void if any material fact or circumstance stated in writing has not been fairly represented by the insured, * * * and this policy shall be inoperative during the existence or continuance of the acts or condition of things

stipulated against as follows: If, without such assent [the assent in writing or print of the company], the situation or circumstances affecting the risk shall, by or with the knowledge or advice, agency, or consent of the insured, be so altered as to cause an increase of such risk, * * * or if the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days without such assent. * * * If this policy is made payable to a mortgagee of the insured real estate, no act or default of any person, other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate. * * *

The mortgage clause attached to this policy was the same in form as that attached to the policy of the German Insurance
5 Company. The MacConnell mortgage, given in the year 1888, was not referred to in either policy, nor does it appear to have been known to either company when the policies were issued. The mortgage clauses attached to the policies were prepared and taken to the respective agents of the companies in Council Bluffs, and were signed without any knowledge on the part of either agent of the existence of the MacConnell mortgage, or of the fact that the property described in the policies was vacant, and nothing was paid for the issuing of either mortgage clause. The appellants contend that the policies had ceased to be of any force when the mortgage clauses were issued, and that the policies were not revived by what was done. The appellee denies that either policy was void, and alleges that the right to claim that they were void was waived by the issuing of the mortgage clauses, and that by reason of having issued them the companies are estopped to assert the invalidity of the policies.

I. We first inquire whether the policies were in force when the mortgage clauses were issued. The provisions of the two policies respecting the effect of incumbrance upon the insured property existing when
6 the policies were issued, and not specified in the policy, are not the same. The policy of the German Insurance Company provides, in terms, as a portion of its policy quoted shows, that the existence of such an incumbrance, not expressed in the policy, should make the policy void. It was important for the company to know the actual condition of the title to the property which it was asked to insure. The existence of an incumbrance thereon was a material fact, which it was entitled to know, and the condition requiring that the incumbrance be stated in the policy was valid. *Lee v. Insurance Co.*, 79 Iowa, 379. It is not claimed that the failure to comply with the conditions was due to any fault on the part of the company, and the failure made the policy void from the beginning. As bearing upon this question, see *Waller v. Assurance Co.*, 64 Iowa, 101; *Fuller v. Insurance Co.*, 61 Iowa, 350; *Henning v. Assurance Co.*, 77 Iowa, 319; *McFetridge v. Insurance Co.*, 84 Wis. 326 (54 N. W. Rep. 326); *Collins v. Insurance Co.*, 44 Minn. 440 (46 N. W. Rep. 906).

The policy issued by the New Hampshire Fire Insurance Company does not contain any clause like that we have been considering. Each policy, however, contained a provision which terminated the liability of the company if the insured property should become vacant without the consent of the company. That of the German Insurance Company provided that the policy should not cover unoccupied buildings, and that if these insured should be vacated without the consent of the company, the policy should "cease and determine." The other provided that, if the insured premises should become vacant, and remain vacant

more than thirty days, without the assent of the company, the policy should be "void and inoperative" during that time. The buildings insured were vacant continuously for more than a year immediately preceding the fire, without the consent of either company. These conditions were valid, and the policies were rendered void thereby, and by permitting the premises to remain vacant as stated. *Sexton v. Insurance Co.*, 69 Iowa, 99.

II. We are next required to determine the effect which the mortgage clauses had upon the policies. Had the policies then been in force, each mortgage clause, and the policy to which it was attached, would
7 have constituted a new contract between the insurance company and the mortgagee, the terms of which would have been ascertained from the mortgage slip and so much of the original policy as the mortgage slip did not modify or supersede. *Ormsby v. Insurance Co.*, 5 S. D. 72 (58 N. W. Rep. 301); *Eddy v. Assurance Corp.*, 143 N. Y. 311 (38 N. E. Rep. 307); *Hastings v. Insurance Co.*, 73 N. Y. 141; *City Five-Cents Sav. Bank v. Pennsylvania Fire Ins. Co.*, 122 Mass. 165; *Phoenix Ins. Co. of Brooklyn v. Omaha Loan & Trust Co.*, 41 Neb. 834 (60 N. W. Rep. 133). The cases cited treat of mortgage clauses which were attached to or became a part of valid and existing policies. A sufficient consideration for the new agreement in cases of that kind may be, and usually is the premium paid for the policy. But in the cases we have before us the policies were void, and all right to enforce them, or to recover premiums which had been paid for them, was at an end when the mortgage clauses were attached, and there was no consideration for the new contracts which they purported to make. In the case of *Davis v. Insurance Co.*, 135 Mass. 251, certain policies of insurance were made void by a conveyance of the insured property. Thereafter an agent of the insurance companies indorsed on the policies

stipulations which purported to transfer to certain mortgagees the insurance for which the policies provided, No consideration was asked or paid for the indorsements, and they were held to be without consideration, and not to have given any rights to the mortgagees. In the case of *Graham v. Insurance Co.*, 87 N. Y. 69, it was held that a mortgagee who claimed under a special-mortgage clause attached to the policy, which contained a provision similar to the provisions in question, could not recover on the policy, which was found to be invalid because obtained through misrepresentations. The rule that a policy which is void between the parties to it by reason of fraud in obtaining it, or by reason of a violation of its provisions, is not revived, nor is a new and valid contract made, by attaching to the void policy an agreement for the benefit of a mortgagee, unless there be a new consideration for it, appears to us to be well founded in reason and to be supported by the authorities. See *Hanover Fire Ins. Co. v. National Exch. Bank*, (Tex. Civ. App.) (34 S. W. Rep. 333); *Omnium Security Co. v. Canada Fire & Mutual Ins. Co.*, 1 Ont. 494; May Insurance, section 70c; Ostrander Insurance (2d ed.), 342. The case of *Ellis v. Insurance Co.*, 68 Iowa, 578, involved the rights of the assignee of a policy of insurance, and, although not in point, may well be read in connection with the question under consideration. We conclude that the attaching of the mortgage clauses to the policies in suit did not revive or create valid contracts.

III. The estoppel pleaded is not established by the evidence, and, as the plaintiff does not claim anything for it in argument, will not be further noticed.

It follows from what we have said that the district court erred in directing verdicts for the plaintiff, and its judgment is, in each case, REVERSED.

A. E. EDDY, *et al.*, Appellants, v. OTHA WEARIN, Appellee, and MARY M. JOHNSON, Administratrix, *et al.*, Appellants v. OTHA WEARIN, *et al.*, Appellees.

Fraudulent Conveyance: SECRET RESERVATIONS. A conveyance of land for a full and adequate consideration will not be set aside as fraudulent to the grantor's creditors because the grantees agreed orally that the grantor should have certain growing crops to feed
1 some cattle belonging to him which were not conveyed, where such crops had been previously mortgaged, part of them were raised by others under contract by which they were to receive a specific price per bushel for their labor, and another part was grown under a lease by which the grantor was to have only one-third of the crops as rental, and all reservation, so far as it was secret, was for the benefit of the grantor's creditors.

SAME A conveyance of land will not be set aside as fraudulent to the grantor's creditors because of an independent agreement not in
2 consideration of the deed, by the grantees, for a life lease of the land to the grantor, which agreement was never carried out.

Appeal from Mills District Court.—HON. WALTER I. SMITH, Judge.

FRIDAY, MAY 13, 1898.

CREDITORS' bills to subject certain real estate, the legal title to which is in the name of Otha and Andrew Wearin, to the payment of judgments against Harry Wearin. The trial court dismissed the plaintiffs' petitions, and they appeal.—*Affirmed.*

John Y. Stone, W. S. Lewis, N. M. Pusey, E. B. Woodruff and C. E. Dean for appellants.

Smith McPherson and L. T. Genung for appellees.

DEEMER, C. J.—Prior to the seventh day of August, 1893, Harry Wearin was the owner of one thousand and

eighty acres of land in Mills county. The land was heavily incumbered, and Wearin was largely in
1 debt. On that day he conveyed seven hundred and sixty acres of this land to his brother, Otha Wearin, and one hundred and sixty acres to Andrew Wearin, another brother. These suits are to set aside these conveyances, and to subject the land to the payment of certain judgments held by appellants. The conveyances are said to be fraudulent because the grantor intended thereby to hinder, delay, and defraud his creditors, which intent was known to and participated in by the grantees; because the grantor made a secret reservation of the growing crops, which on the face of the deeds passed to the grantees; and because of a secret life lease reserved to the grantor of two hundred and forty acres of the land conveyed. Claim is made that, notwithstanding there was full and adequate consideration for each of these conveyances, they were made with intent on the part of the grantor to hinder and delay his creditors, and that this intent was known to and participated in by the grantees. This contention presents purely an issue of fact, which we have carefully considered in the light of the record presented, with the result that we fail to find that evidence of actual fraud which will justify us in setting the conveyances aside. A review of the evidence would be without profit, and we content ourselves with stating ultimate conclusion only. At the time the conveyances were made there was a crop of corn growing upon part of the land covered by each deed. This crop was not reserved in either conveyance. Appellants argue that it was secretly reserved to the grantor, and that this is conclusive evidence of an intent to defraud. The evidence shows that there was some talk about the crop growing upon the land, and that the grantees finally

agreed that Harry Wearin should, as between them (the parties to the deed), have it to feed some cattle, which were not conveyed. If this were all, there might be some ground for claiming that there was a secret reservation in the grantor which would affect the integrity of the conveyance. But we find, from an examination of the record, that the grantor had previously mortgaged this crop to certain of his creditors; that part of it was raised by others under contract by which they were to receive fifteen cents per bushel for their labor; that the grantor borrowed money with which to pay part of this claim, secured by a mortgage upon the crop; and that still another part was grown under a lease by the terms of which the grantor was to have but a third of the crop produced, as rental for the land. From this it will be seen that all that part of the growing crop in which the grantor had an interest had been constructively severed from the soil by the making of the chattel mortgage before the conveyances in question were made; and it is also clear that that part of the crop not owned by the grantor did not pass, and there was no occasion for reserving it in the conveyances. Moreover, the evidence shows that the reservation, if any, was for the benefit of Harry Wearin's creditors. The corn was to be fed to cattle which he then owned, and which, although they were covered by a large mortgage, all parties expected would double in value, and thus afford the grantor more means with which to pay his debts. The crops were not subject to levy at the time the conveyances were made. *Ellithorpe v. Reidesil*, 71 Iowa, 315. And their reservation, under the facts of this case, was not such evidence of fraud as should defeat the conveyances of the land.

Again, it is urged that there was a secret reservation of a life lease in two hundred and forty acres of the

land, to Harry Wearin, which was a part of the consideration for the land, and that this reservation is
2 conclusive evidence of fraud. The record shows that at the time of the making of these conveyances the grantor and grantees agreed upon a lease of part of the land to the grantor and his sons for the sum of three dollars and thirty cents per acre cash rent. These leases were never consummated, however, for the reason that the grantor lost all his horses and other property, and was unable to pay the rent of, or farm the lands. It does not appear that these leases constituted any part of the consideration for the conveyances. On the contrary, they were to be based upon an independent and agreed compensation of three dollars and thirty cents per acre. These estates were not secretly reserved from that granted, but were new and independent titles or tenancies, to be created in the future, upon a new and distinct consideration. Now, while it is no doubt true that a secret reservation between the vendor and vendee will render a conveyance fraudulent in law, irrespective of the intention with which it was executed, as is illustrated in the cases of *Macomber v. Peck*, 39 Iowa, 354, and *Dean v. Skinner*, 42 Iowa, 418, yet where, as in this case, there was no secret reservation of the use of the land in part consideration for conveyance, but an independent contract or agreement to lease based upon a new consideration, the rule does not apply. *Stroff v. Swafford*, 81 Iowa, 695; *Brown v. Bradford*, 103 Iowa, 378. The evidence is not sufficient to establish fraud in fact. Indeed, the contrary clearly appears, and, before we are justified in holding the conveyances fraudulent in law, the facts should be such as to bring the case clearly within the rules. No such showing is made. Indeed, we are quite strongly impressed with the good faith of the entire transaction. The decree of the district court is AFFIRMED.

BENJAMIN & ASKWITH V. ANNA DOERSCHER, Appellant.

Homesteads: INSURANCE: Garnishment. The proceeds of an insurance policy on a homestead are not exempt from garnishment in
1 case of a widow who had elected to take her distributive share instead of her homestead right, under the statute.

DEVESTMENT. The taking by a widow of her distributive share in her
2 husband's estate divests the homestead right under Code, 1873, sections 2007, 2003.

LIABILITY FOR DEBTS OF WIDOW. Where a widow divests her homestead right by taking her distributive share in her husband's estate,
3 it subjects such homestead to her debts contracted before that time.

Appeal from Pottawattamie District Court.—HON. N. W. MACY, Judge.

FRIDAY, MAY 13, 1898.

REIMER Doerscher died about October 17, 1892, leaving as his widow the defendant, Anna Doerscher. Before and at the time of his death Reimer Doerscher owned certain premises, which he and his wife occupied as their homestead; and his wife occupied the same thereafter, by herself, or by others in her stead, until the house was destroyed by fire. On the fifth day of August, 1887, the plaintiff obtained a judgment against Anna Doerscher in the sum of seventy-nine dollars and thirty-four cents and costs, and a transcript thereof was filed in the office of the clerk of the district court. On the twenty-second day of June, 1893, the dwelling house on the homestead premises was burned; and H. Mendel, who was administrator of the estate of Reimer Doerscher deceased, and is a party defendant in this suit, received one thousand dollars insurance due on account of the loss of the house. Plaintiff took execution on its

106	391
121	352
106	391
125	393

judgment, and garnished Mendel, who answered that he had a part of the money received on account of said insurance, the amount being greater than plaintiff's claim. Thereafter Anna Doerscher filed her motion to dismiss the garnishment proceedings on the ground that her share of the proceeds of the insurance was exempt from execution, because it was the avails of insurance on the homestead. The motion was supported by affidavit, and was submitted upon evidence introduced by Anna Doerscher, and overruled. Anna Doerscher then filed her answer or defense to the proceeding. Plaintiff then moved the court for judgment against the garnishee on his answer and that of Anna Doerscher, which the court sustained, from which judgment Anna Doerscher appealed.—*Affirmed.*

John M. Galvin for appellant.

Benjamin & Preston for appellee.

GRANGER, J.—Error is assigned on the ruling of the court denying the motion to dismiss the garnishment proceedings, and also on its ruling sustaining the motion for judgment. It is not important to consider the assignment based on the ruling of the court on the motion to dismiss; for that action of the court was at once followed by the filing of an answer or defense to plaintiff's claim to judgment, and it is an elaborate statement of the facts relied on, and presents the same grounds as did the motion, and the judgment of the court is based on the facts as pleaded by appellant. We need not determine the question of such a motion being proper, because the answer must have been intended as a presentation of the same reasons for the discharge of the garnishee, in another way, and would be a waiver of the former method. There is no question as to the answer of the garnishee. It is a plain admission of what

is held by him, and no one questions it. Hence it becomes a question whether appellant, in her statement of facts on which she seeks the discharge of the garnishee, has shown herself entitled to the relief she asks, which is that the money in the hands of the administrator be adjudged as exempt to her, because it is the proceeds of insurance on the homestead. A part of the

1 answer deals with facts to show that the money in the hands of the garnishee is proceeds of the insurance, which fact we recognize; so that we need not further notice that part of the answer. It appears from the answer that, because of certain facts, appellant has been prevented heretofore from getting the proceeds of the insurance, so as to rebuild her said homestead, or from building another (a new homestead) for herself out of her share of the proceeds of said insurance and of the proceeds of her husband's estate. The following is the concluding paragraph of her answer: "(8) That the defendant has elected heretofore to take her distributive share of her said husband's estate, but has been unable to obtain her said share, for the reasons aforesaid; that defendant claims all of her said share as exempt to her from garnishment; that under the statutes of this state the defendant is entitled to have set apart to her one-third in value of her said husband's estate, and that she desires and insists upon having said distributive share set off to her, and that she now has, as she always has had, the desire and intention of using said distributive share in the investment of a new homestead; and that said total distributive share will be much less in value than was the value of the old homestead at the time the dwelling house thereon was destroyed by fire." It appears conclusively from this answer that there is no purpose to further occupy the homestead left by the husband, but it clearly appears that appellant's intention is to take her distributive share in her husband's

estate, and with it make a new home. There is no purpose to preserve the homestead right, instead of taking a distributive share, but the intention is to take the distributive share, which, of itself, defeats the homestead right; and then the claim is that she takes her share of the proceeds of the homestead exempt from liability for her prior debts, because it is her purpose to use that, with the remainder of her distributive share of the estate, to make a new home. The law gives to the surviving wife or husband no such right. No such a claim could be reasonably urged, except on the basis of an existing homestead right. The taking of the dis-

2 tributive share in the estate divests the homestead right. Code 1873, section 2007, 2008; *Whitehead v. Conklin*, 48 Iowa, 478; *Butterfield v. Wicks*, 44 Iowa, 310; *Meyer v. Meyer*, 23 Iowa, 359. It is not made to appear that her distributive share will include the homestead lot or lots, so that, if it could be done, the rule could be made to apply, that, where the homestead is set apart as the distributive share of the widow, she takes it exempt from debt contracted prior to that time. See, for such rule, Code 1873, section 2441; *Knox v. Hanlon*, 48 Iowa, 252; *Briggs v. Briggs*, 45 Iowa, 318. It is there held that, if the home-

3 stead is set apart to the widow as her distributive share, she takes it exempt from debts of hers contracted prior to that time. As we understand the facts of this case, the widow purposes to take her distributive share exempt from liability for her debts, and invest it in a new home. No authority cited sustains such a right. The judgment is AFFIRMED.

DAVID HAGGERTY, *et ux*, Appellant, v. GEORGE L.
BROWER, *et al.*, Appellants.

Deed as Mortgage: EVIDENCE. On making a loan of three thousand dollars, the lender took a three thousand dollar mortgage to a third person, and a real estate and chattel mortgage to secure six hundred dollars, and a deed to himself, without assuming the three thousand dollar mortgage; and he testified that the grantor had called on him for a loan, was unwilling to allow a mortgage on his land to be foreclosed, and insisted on the lender's paying off the debt and taking a deed, giving him one year in which to repurchase. The grantor was unable to read or write, and testified that the deed was given only as security, and he was corroborated by members of his family. *Held*, that the deed should operate as a mortgage.

EVIDENCE. Evidence that the grantor in a deed absolute on its face, but claimed by him to have been given to secure a debt, leased the premises from the grantee tends to show that the latter owned the land but is not conclusive on that point.

DEFEASANCE. The title of the grantee in a deed subject to a defeasance becomes absolute if by agreement the defeasance is cancelled or surrendered.

Homestead Right: EVIDENCE. A wife, unable to read or write, ignorant of her rights, and acting under a belief that the grantee in a deed given to secure a debt, had absolute right to her property, and not knowing that her husband had accepted a lease from him, asked him to build a new house on the land. *Held*, not to preclude her from setting up a claim of homestead.

SAME. A conveyance of a homestead by both husband and wife by a deed, absolute on its face, but intended only to secure a debt, does not destroy the homestead character of the land conveyed, and the wife cannot be deprived of her homestead right therein by a subsequent release of his right to redeem, executed by the husband alone.

Maxims. Once a mortgage always a mortgage—Exceptions.

5

Appeal. On appeal from a judgment decreeing that defendant is absolute owner of certain land, in an action by plaintiff to have a deed absolute on its face declared a mortgage, the supreme court may, where it decides that plaintiff has a right to redeem, and is

106	395
114	486
106	395
123	591
106	395
125	440

106	395
144	190

- 7 unable from the record to state the account correctly and specifically, state such account as far as possible and then remand the cause for further action by the trial court.

Appeal from Pocahontas District Court.—HON. LOT THOMAS, Judge.

FRIDAY, MAY 13, 1898.

PLAINTIFF seeks in this action to have a deed executed by himself and wife to defendant declared a mortgage. Defendant filed a cross bill, making plaintiff's wife also a defendant therein, and prayed that he be decreed the absolute owner of the real estate in question, and that his title thereto be quieted. Plaintiff's wife, by pleading filed, sets up a right of homestead. There was a trial to the court, and a decree in defendant's favor. Plaintiff and his wife appeal.—*Reversed.*

Geo. Heald and Frank Farrell for appellants.

Stevenson & Lavender for appellee.

WATERMAN, J.—Plaintiff owned and resided upon a farm of two hundred and forty acres in Pocahontas county, this state. - He was considerably embarrassed financially, and desiring to make a loan on his farm, in order to obtain time in which to pay what he was owing, he sent for defendant, who was a loan broker, and whose assistance he desired in arranging his affairs.

1 In response to the call, defendant went to plaintiff's residence. After some talk it was found that plaintiff needed about three thousand, six hundred dollars to clear up his outstanding indebtedness. This was more than defendant thought the land would bear. Defendant was not loaning his own money, but was procuring funds for farm loans from others. After some talk, it was agreed that plaintiff and his wife should

make a mortgage for three thousand dollars to one Kiene, a second mortgage for six hundred dollars to defendant, a chattel mortgage (also to defendant) to further secure the said six hundred dollars, and also give the deed in question. These instruments were all executed and delivered. Defendant procured the money, and paid off the indebtedness of plaintiff, which amounted to something more than three thousand, six hundred dollars. Plaintiff thereafter gave his note to defendant for the excess. The facts so far stated are not in dispute. The contention arises on the question of how it came that the deed was given defendant. Plaintiff's claim is that the deed was made only as additional security for the loan, while defendant insists that it was an absolute sale. He admits that he gave plaintiff one year in which to repurchase the premises, but says that the right to take advantage of this was lost by a failure to exercise it within the time given, and therefore he is now the unqualified owner of said land. The transactions spoken of took place in March, 1890; and in March, 1891, plaintiff leased the land from defendant at an annual rental of three hundred and ninety dollars. Leases were also taken by plaintiff for the years 1892 and 1893, respectively.

II. We will first consider the testimony relating to the deed: To establish its character as a mortgage, the evidence must be clear, satisfactory, and convincing.

2 The fact that plaintiff leased the premises of defendant tends to show that the latter was the owner, but it is not conclusive. *Rogers v. Davis*, 91 Iowa, 730. Plaintiff was an ignorant man, unable either to read or write; and he claims that he took the lease under a misapprehension of his rights caused by statements of defendant. On the other hand, we think the testimony of defendant, alone, is sufficient to

show that he took the title to this property only as security for the money advanced. He testifies
3 that he called upon plaintiff to make him a loan.

No other purpose was contemplated by either party. And he says that when he ascertained the amount of plaintiff's indebtedness, a part of which was secured by mortgage on the land, he at first declined to make the loan. He told plaintiff to let the mortgagee foreclose. Repeating his words, "I said to him, 'Your land will be well enough sold if they foreclose, and you will have a year's possession.'" But he says further that plaintiff did not wish to have a foreclosure, and insisted that defendant take a deed for the land, and pay the debts, and give plaintiff one year's time in which to re-purchase. Inasmuch as plaintiff was getting nothing for himself out of the land, in the sale to defendant, it seems somewhat strange that he should be solicitous for that method of paying his debts, rather than through foreclosure proceedings. But another circumstance admitted by defendant seems conclusive of the character of this transaction. At the time he took the two mortgages on the land, and the deed, he took also from plaintiff and his wife a chattel mortgage on four horses and eight cows, to secure a note of six hundred dollars, payable to defendant's order, and which note had upon it a pencil memorandum that it was collateral security for the real estate mortgage of six hundred dollars. If this deed canceled plaintiff's indebtedness, as claimed by defendant, why was the chattel mortgage taken? Nor can we understand why the two real estate mortgages were executed, if the lands were sold to defendant. The six hundred dollar mortgage was made to defendant, and, as part of the same transaction, he claims the land was sold to him. The three thousand dollar mortgage was made to one Kiene. Defendant

did not assume its payment, in the deed, nor even take the land subject to it. Plaintiff is still liable on the three thousand dollar note. According to defendant, plaintiff gave him the land in consideration of the payment of his indebtedness, and yet continued liable, and is to-day, for three thousand dollars of the amount. There is no reasonable explanation of these facts on defendant's theory that the deed was an absolute conveyance. The plaintiff testifies most positively that the deed was given only as security. He is corroborated by members of his family. This evidence, taken in connection with the circumstances to which we have just called attention, settles the question in plaintiff's favor.

III. But defendant claims that, if the deed is held to be a mortgage, the fact will not avail plaintiff, because he has surrendered his right to redeem. It seems that in October, 1891, which was after plaintiff leased the premises, the defendant delivered, and plaintiff accepted, the note for six hundred dollars, secured by the second mortgage, and the note for the excess over three thousand, six hundred dollars paid by defendant. It is not clear from the abstract, but we may assume that the note secured by the chattel mortgage was also surrendered. It is difficult to get at some of the facts very exactly. Some of these notes may have been delivered to plaintiff in March, 1891, but it is certain that part of them were held by defendant until October of that year. It appears, however, that all of the notes which were given, except the three thousand dollar note to Kiene, were surrendered to plaintiff, and accepted by him. According to plaintiff's testimony, the deed was given as security for the amount in excess of three thousand dollars which should be found necessary to pay his then existing debts. While fraud is charged in obtaining this deed, there is no evidence

of it. Plaintiff and his wife testify to its execution and delivery. We have found that the deed was
4 subject to a defeasance. The general rule of law in such cases is that if, by agreement, the defeasance is canceled or surrendered, the title of the grantee in the deed becomes absolute. *Vennum v. Babcock*, 13 Iowa, 194; *Trull v. Skinner*, 17 Pick. 213; 1 Jones, Mortgages, section 338. Such a case is an exception
5 to the maxim, "Once a mortgage, always a mortgage." 1 Jones, Mortgages, section 340. When plaintiff accepted the return of his notes, and consented to the cancellation of his indebtedness to defendant, it is said, the deed in question became an absolute conveyance, so far, at least, as plaintiff is concerned; and this, perhaps, would be true, if his right alone was in issue. But it is urged by appellants that the land conveyed included the homestead, and that plaintiff's release of his right to redeem, however it might affect him, could not bar the claim of the wife, and that she is a party to this action, asking affirmative relief. Contrary, we believe to the general rule, it is held in this state that a deed absolute in form, but made as security for a debt, vests the legal title in the grantee. *Burdick v. Wentworth*, 42 Iowa, 440; *Richards v. Crawford*, 50 Iowa, 494. And yet we hold in *McClure v. Braniff*, 75 Iowa, 38, that a conveyance of the homestead by
6 a deed absolute on its face, but which is intended only to secure a debt, does not destroy the homestead character. Following the rule of this last case, we must hold here that the wife's right is no more barred in this case than it would be under a statutory mortgage if the husband, for a consideration relinquished his right to redeem. As having some bearing on the point under discussion, we cite *Beedle v. Cowley*, 85 Iowa, 540; *Morris v. Sargent*, 18 Iowa, 90; *McHugh v. Smiley*, 17 Neb. 620 (20 N. W. Rep. 296; 24 N. W. Rep.

277). There is some evidence tending to show that the wife on one occasion, after the execution of this deed, asked defendant to build a new house on the farm. This, we suppose, was intended to appear as an acknowledgment of the conveyance of title. Mrs. Haggerty, like her husband, was unable to read or write. Both were quite ignorant of their rights. After the lapse of some time, when Haggerty was unable to make payments on his indebtedness, and defendant claimed title, both husband and wife seem to have thought his claim was well founded. If the wife's request for a new building was made at this time, when she was laboring under this misapprehension, it is entitled to no weight against her. It does not appear that she ever consented to, or, indeed, knew of, her husband taking a lease from Brower.

From what we have said, it is apparent that plaintiff and his wife have a right to redeem from the claim of defendant. We are not able, from the record, to state the account accurately and specifically.

7 We shall do so as far as we can, and then remand the case for further action in this respect, by the trial court. Although this is an equitable action, we have authority for this proceeding. *White v. Farlie*, 67 Iowa, 628. Defendant, Brower, will be entitled to credit for six hundred dollars, with interest thereon at ten per cent. from March 4, 1890, as represented by the two notes of three hundred dollars each. To eighty-six dollars and thirty-five cents with ten per cent. interest thereon from August 6, 1890, evidenced by the note given for the amount in excess of three thousand six hundred dollars disbursed by defendant for plaintiff's benefit. To taxes paid as follows: Forty-eight dollars and ninety-four cents paid December 7, 1891; forty dollars and twenty-six cents paid September 30, 1892; thirty-five dollars and eighteen

cents paid March 28, 1894; thirty-six dollars and seventy-seven cents paid March 21, 1893; fourteen dollars and eighty-three cents paid September 19, 1893. On these amounts he is entitled to interest at six per cent. from date of payment. He should also have credit for amounts paid on the three thousand dollar mortgage, which seem, in the aggregate, to be one thousand and fifty dollars. On this amount interest should be calculated at the rate of six per cent. per annum from the dates of payment, which dates we are unable to find. Defendant should be charged with the rents received from Haggerty. The rent reserved was three hundred and ninety dollars per annum. It was paid for two years in full, and in part for the third year. We are not able to say, from the record, just the amount paid on the last lease, and it does not appear when these payments were made. Brower should be charged with interest on these amounts, from the dates when he received them, at the rate of six per cent. per annum. Taking the total of Brower's credits, and deducting therefrom the amounts which we have indicated as a charge against him, and the remainder will be the sum to be paid by plaintiff to effect a redemption. This redemption, we think, should be made within ninety days from the date of entering the decree herein. If default is made in so doing, such right will be barred.—
REVERSED.

THE P. COX SHOE COMPANY V. A. A. ADAMS, F. O. ADAMS, Trustee, Defendants and Appellants; HILLIARD & TAYLOR, *et al.*, Cross Petitioners and Appellees, and RONEY & BERGER and E. H. COWLES & COMPANY. Cross Petitioners and Appellants.

105	402
120	508
105	402
137	304

105	402
138	162
138	389

Fraud in Sale: RESCISON. A sale of goods to a purchaser, who has
7 a secret intention of not paying for them may be rescinded.

EVIDENCE. A dealer knew that false ratings were given him by commercial agencies, and made false representations himself concerning his solvency, and bought in small lots, on time, from sixty-three wholesalers to an amount greatly in excess of the demands of his trade and his ability to pay. He duplicated goods on hand, and bought unseasonable goods, and urged prompt delivery. *Held*, that these facts prove an intention of cheating the sellers out of the purchase price.

FALSE REPRESENTATIONS. A sale of goods to a vendee, who falsely represents himself either to the vendor or a commercial agency, to be solvent, knowing himself to be insolvent, which sale is made in reliance upon those representations, can be rescinded, although the sale was not made for a year after the representations were made.

TO COMMERCIAL AGENCY. Where a commercial agency gives a dealer a rating which is false, but is not based upon any statement of the dealer, a sale made to him on the strength of that rating can be rescinded, if he referred the vendor to that rating with approval, but not otherwise.

SAME. The information gathered by a commercial agency for a particular line of trade is presumed to be for the benefit of those in that line of business, and it is presumed that a vendor in that line rightly uses its reports, and one who makes a statement of his financial condition to an agency does so with the intent that it will be communicated to such of its patrons as may inquire.

EVIDENCE OF SIMILAR FRAUDS. In action to rescind a contract on the ground of fraudulent misrepresentations, it is not necessary to allege conspiracy in order to introduce evidence of similar transactions at or about the same time, each transaction being charged to be one of a series of fraudulent purchases made with secret intent not to pay, and through false representations.

OF INSOLVENCY. Evidence that a dealer has a stock of goods worth fifteen thousand dollars, and at the same time owes twenty-three thousand dollars, and conceals his condition from commercial agencies, fully establishes insolvency.

Vendor's Lien: DEFENSES BY MORTGAGEE: Antecedent debt. Where a mortgage is given on property to secure debts antedating the purchase of the property, no defense is available to the mortgagee, in replevin by the vendors of such property, which cannot be set up by the mortgagor.

POSSESSION BY MORTGAGEE. Where a vendor is induced to sell goods by fraudulent representations of the vendee concerning his solvency, which goods are thereafter mortgaged for an antecedent

debt, and the vendor elects to rescind the sale, the possession of the goods by the mortgagee will not defeat the claims of the vendor.

Priority of Liens: *PRACTICE: Law and equity.* A mortgage given for a consideration, only a part of which constitutes a superior
2 lien as to other creditors, cannot be set aside in a court of law, but a court of equity may order it satisfied to the extent that it is a first lien, and discharged as to the remainder.

REPLEVIN: *Amendment.* Where an action in replevin has been
4 begun in good faith, and facts subsequently discovered indicate that the relief sought is obtainable only in a suit in equity, the plaintiff should be allowed to amend his petition to one in equity.

CONSOLIDATION. Code, section 3644, provides that where two or more
5 actions are pending in the same court, which might have been
6 joined, they may be joined on motion of defendant. *Held*, that the remedy therein provided is not exclusive, and that suits in equity begun in the same court by a number of vendors against a common vendee and a mortgagee of the vendee, to rescind their contracts of sale and set aside the mortgage, may be consolidated on motion of the plaintiff.

Appeal from Des Moines District Court.—HON. JAMES D. SMYTH, Judge.

FRIDAY, MAY 13, 1898.

IN 1889, A. A. Adams, with a capital of seven thousand dollars in money and merchandise, which F. O. Adams had paid him for his interest in the estate of A. G. Adams, deceased, begun business at Burlington as a retail dealer in boots and shoes, and continued therein until November 20, 1894. On that day he executed a chattel mortgage covering his entire stock of goods to the National State Bank, securing the payment of an indebtedness of three thousand, seven hundred and fifty dollars, and another to F. O. Adams, trustee, securing thirty-eight notes, bearing different dates, amounting in all to sixteen thousand, three hundred and thirty-three dollars and thirty-eight cents; and under these

mortgages F. O. Adams took possession. On the twenty-fourth day of November, 1894, the plaintiff filed its petition in replevin, wherein it alleged certain goods of the value of four hundred and forty-nine dollars and fifty cents were purchased from it by A. A. Adams when insolvent, with the intention not to pay therefor, and to cheat the plaintiff out of the purchase price; that it had elected to rescind the sale; and prayed that a writ be issued restoring the goods. A writ of replevin was issued accordingly, and the goods described turned over to the plaintiff. Forty-four suits of the same kind were begun prior to December 6, 1894, by the defendants and cross-petitioners, and the goods sold by them to Adams in whole or in part returned under writs duly issued. Besides these, three actions in *detinue* were begun. The petition in each of these cases shows that the goods were purchased after the debts secured by the mortgages were contracted. F. O. Adams, trustee, answered May 11, 1895, in each action, putting the plaintiffs to proof, alleging the execution of the mortgages, and that not all of the indebtedness was incurred prior to the purchase of the goods. This answer was amended August 1st, and it was alleged that the bank surrendered certain securities at the time the mortgage was executed to it, and F. O. Adams, as trustee, in writing, assumed to pay all unpaid bills of A. A. Adams in the city to the amount of two hundred and fifty dollars, as a part of the consideration of the mortgage to him. The plaintiff thereupon filed "an amendment and supplement to the petition in equity," alleging that up to the time the answer was filed it had no knowledge of any new consideration in the mortgages; that the value of property in possession of F. O. Adams was twenty-seven thousand dollars, of which A. A. Adams had an unquestioned title to that valued at nine thousand dollars; that

goods to the amount of seventeen thousand, seven hundred and twenty-four dollars and thirty-four cents were claimed by forty-five different alleged vendors as having been obtained by fraud, and replevin suits therefor were pending, and also actions in *detinue* by three parties claiming goods valued at one thousand and five dollars and forty-three cents; that Adams had filed the same answer in each of said cases; and the plaintiffs in all said actions were made defendants. It also alleged that adequate relief could not be had in a court of law, and the plaintiff prayed that the mortgages be declared null and void; that its right to the property claimed be adjudged absolute; that if the mortgages or either of them be found a valid lien, in whole or in part, the property to which A. A. Adams' title was not questioned be first applied in satisfaction thereof; and that the rights and priorities of the respective claimants to the property be determined. On the same day a similar amendment and supplement to petition in equity was filed in each of the other cases, and the plaintiff moved that all be consolidated with his action, on the ground of identity of parties, of subject matter, and kinds of action. The defendants filed a motion in each action asking that the amendment and supplement to the petition be stricken from the files because of plain, speedy, and adequate remedy at law; that it occasioned a misjoinder of parties and causes of action; and that the facts stated did not set forth a proper subject of equity jurisdiction. Subject to ruling on the motion, a demurrer on similar grounds was filed in each case. Both the motions to strike and the demurrers were overruled, and the motion to consolidate sustained, and, on motion of the Pontiac Shoe Manufacturing Company, the case was ordered to be tried by the equitable method. This company filed an answer and cross-petition, November 16, 1895, in which substantially the

same allegations are made as in the petition, and containing substantially the same prayer. In addition thereto, however, it is further alleged that "said A. A. Adams caused and permitted a false statement of his financial condition to be published and circulated by the commercial agency of R. G. Dun & Co., whereby he was shown to be solvent, and worth, above his debts, from five to ten thousand dollars, with the intent that the said false statement should be examined and acted upon as true by those who were asked to extend credit to him. Said statement was false, in that he was then insolvent, and his liabilities largely exceeded his assets, as he well knew. Defendant examined said false statement before said order, and, believing the same to be true, was thereby induced to part with his property as stated." All of the plaintiffs in the replevin and detinue suits filed answers and cross-petitions substantially like that of the Pontiac Shoe Manufacturing Company, varying, of course, as to date, description of goods, value and quantity thereof, and as to the commercial agencies consulted and relied on. A. A. Adams answered, admitting the purchase of goods and the execution of the mortgages, but denying all other allegations. F. O. Adams' answer was substantially as heretofore set out. Evidence was introduced, contained in three hundred and sixty pages of the abstracts, and the court entered its decree as prayed by the plaintiff and all the interveners, except C. L. Hathaway & Sons, the American Shoe Company, E. H. Cowles & Co., and Roney & Berger. Against these cross-petitioners judgments were entered in favor of F. O. Adams and E. H. Cowles & Co., and Roney & Berger appeal. F. O. Adams, F. O. Adams, trustee, and A. A. Adams also appeal.—*Reversed* in part,

Seerley & Clark and *E. S. Huston* for appellants *F. O. Adams* and *A. A. Adams*; *Blake & Blake* and *Smyth & Le Wald* for appellants *Roney & Berger* and *E. H. Cowles & Co.*

Blake & Blake, *C. L. Poor*, *Smyth & Le Wald*, *W. W. Dodge*, *W. H. Stutsman*, *Stutsman & Stutsman* and *Kelley & Cooper* for appellees.

LADD, J.—The plaintiff and the cross-petitioners, whom we shall term vendors, base their claim to the goods in controversy on purchases alleged to have been fraudulently made by A. A. Adams. The mortgages under which F. O. Adams was in possession were executed after, but apparently to secure debts antedating such purchases. If so, then the mortgagees, or F. O. Adams, as their agent, could set up no defense not available to the mortgagor. *Reed v. Brown*, 89 Iowa, 454; *Starr v. Stevenson* 91 Iowa, 684. The actions, under such circumstances were maintainable at law. Some six months after these were begun F. O. Adams, trustee, answered, disclosing for the first time a new consideration for each mortgage. The stock invoiced twenty-four thousand, seven hundred and sixty-eight dollars and ninety-seven cents. The mortgages amounted to twenty thousand and eighty-three dollars and thirty-eight cents, and the vendors claimed ownership of separate portions of the stock, in all valued at about eighteen thousand dollars. If these mortgages, or either of them, were found to be valid liens, that portion of the stock to which A. A. Adams had an unquestioned title, as well as any of the goods claimed by vendors and found to belong to him, should be first applied in satisfaction thereof. The application could not be required except in a court of equity. In a sense, then, each vendor was adversely

interested against the other as well as against A. A. and F. O. Adams, trustee, whom we shall designate as defendants; for, if the proceeds of goods held by the defendants against certain vendors were applied on the mortgages, the lien on the goods of those vendors who recovered would be less or might be extinguished. If the mortgages were valid liens for any sum, they operated as a complete defense in an action at law, even though that part of the stock to which A. A. Adams had an unquestioned title was adequate for their satisfaction. Under such circumstances, resort to a court of equity was necessary, that appropriate orders might be entered for the protection of all parties. Besides, a new consideration of two hundred and fifty dollars for the mortgage to F. O. Adams, trustee, was pleaded in the answer. If this alone were sustained, it would defeat the actions at law, while in equity the mortgage might be satisfied to this extent, and defeated in so far as it secured an antecedent debt. *Zucker v. Karpeles*, 88 Mich. 413 (50 N. W. Rep. 373); *Kitteridge v. Chapman*, 36 Iowa, 348; *O'Brien v. Harrison*, 59 Iowa, 686; *Wormley v. Wormley*, 8 Wheat, 421; *Dows v. Kidder*, 84 N. Y. 121. The case at bar differs from *Clark v. Barnes*, 72 Iowa, 563, in several important particulars. There immediate possession, under an agreement to sell in the usual course of business, was held to impose a responsibility amounting to a new consideration, which would give priority to the mortgage over a prior unrecorded bill of sale executed as security. There the title was in the mortgagee; here, if the allegations of the petition are true, he had no title after the election to rescind the sale. There he was bound to sell in the usual course of business; here he was unrestricted. F. O. Adams simply held the goods in controversy, in connection with others, which he might properly sell and apply on the mortgages. We do not think mere possession should defeat the claims of the defrauded vendors. See *Barnard v. Campbell*, 58 N. Y. 76. Virtually, this was

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so held in *Reed v. Brown*, *supra*. The doctrine of *Clark v. Barnes* ought not to be extended, and, in any event, no more than the expenses incurred under the terms of the mortgage, securing an antecedent debt may be set up as against the suit by a defendant vendor. These were neither pleaded nor proven. The plaintiff could not well have anticipated the disclosures of the defendant's answers, and it was not an abuse of discretion to permit it to file the amendment setting forth a cause of action in equity praying for appropriate relief.

II. It is said, however, that a petition in replevin or *detinue* cannot be so amended as to become a petition in equity. The right to do so in other actions, prosecuted by ordinary proceedings, is well settled.

Barnes v. Insurance Co., 75 Iowa, 11; *Newman v.*

Insurance Ass'n, 76 Iowa, 56. Now, there is nothing sacred about a replevin suit. The pleadings are exceptional only as so made by statute, and in other respects are governed by the same rules as obtain in ordinary actions. It is true possession of property may be acquired, pending litigation, by giving ample security, unless a delivery bond is furnished. This is not for the purpose of affording either party a benefit or advantage, as suggested by the appellants, but to assure the status of the property or its equivalent in value. If, after an action to recover specific property has been begun, it develops that the plaintiff can only obtain relief in chancery, and that the issues are properly triable there, it is not perceived why he ought not to be permitted to amend his petition, and have the action transferred to that side of the calendar. The mere fact that he was misled into bringing an action in the wrong forum ought not to defeat his recovery. Code, section 3432. Under the code system of pleading, no litigant should be denied relief because of an error in the mere form of the action, when ready, by amendment,

to adopt that appropriate to the relief prayed. The mere method should not obscure the results to be obtained. Where a suit in replevin is begun in order to obtain possession of the property, with the purpose of afterwards amending so as to ask equitable relief, such an amendment ought not to be permitted. But where such an action has been brought in good faith, and facts subsequently discovered indicate that the only relief sought must be had in another forum, we think the plaintiff should be permitted to amend his petition accordingly. In such a case though, possession of the property has been acquired, the defendants are amply secured and will not be prejudiced by the change. See Code, section 3641; *Cook v. Railway Co.*, 75 Iowa, 169; *Weaver v. Kintzley*, 58 Iowa, 191; *Homan v. Hellman*, 35 Neb. 414 (53 N. W. Rep. 369); 1 Enc. Pl. & Prac. 569.

III. What has been said disposes of the contention that there was a defect of parties and of causes of action in the original petition, but we understand this same objection to be urged against the consolidation of the actions. Such an objection might be urged with greater force were they on the law side of the calendar. The important inquiry in equity, however, is with respect to the identity of the subject-matter involved.

5 The aim is to bring in all the parties in interest, and suits will be consolidated without especial regard to the identity of parties. This is because of the power of such a court to make appropriate orders, according each party exact justice. *Russell v. Bank*, (Ill. Sup.), 29 N. E. Rep. 37; *Moore's Adm'r v. Francis*, 17 Tex. 28; 4 Enc. Pl. & Prac. 692; *Biron v. Edwards*, 77 Wis. 477 (46 N. W. Rep. 813). In the last case it is said: "We cannot doubt that the power inheres in a court of equity, in its discretion, to consolidate causes pending therein, for the purpose of avoiding a multiplicity of the suits and trials, when the consolidation

can work no injury to any party. This power is essential to the proper administration of justice, and
6 does not depend upon any statute for its existence." Section 3644 of the Code does not apply to such a case as that before us, and we do not think the remedy there provided is exclusive. See *Viele v. Insurance Co.*, 26 Iowa, 9; *Turner v. Bradley*, 85 Iowa, 512. Now, in these actions all the vendors as well as the defendants were interested in (1) the validity of each mortgage and the amount owing thereon; (2) the amount of goods, if any, held to be subject to the payment of the mortgages; (3) in the amount of goods each vendor should recover; (4) and, as will be seen, nearly all the evidence introduced was admissible on the issues raised in each petition as amended. Besides, the parties were identical, except that the plaintiff in one case was the defendant in every other. Under such circumstances, it would have been an inexcusable waste of time to have tried each action separately, and unnecessary cost would have been incurred. We think there was such identity of interest, of subject-matter, and of parties as to warrant a court of equity, in order to avoid a multiplicity of suits, to order their consolidation.

IV. It will be observed that the defendant A. A. Adams is charged by each vendor with purchasing the goods with a secret intention of not paying therefor, and of executing the mortgages as a part of that
7 scheme. If he had such an intent, and failed to disclose it, this would be a fraud on the vendor, owing to which the sale could be rescinded. *Starch Factory v. Lendrum*, 57 Iowa, 581; *Lindauer v. Hay*, 61 Iowa, 665. See *Wilmot v. Lyon*, 49 Ohio, 296 (34 N. E. Rep. 720). It is also alleged by some of the vendors that he falsely represented himself as solvent, knowing he was not, and that goods were sold in reliance thereon. If so, such sales might be rescinded, and the goods

recovered. *Reid v. Cowduroy*, 79 Iowa, 169. If the evidence bearing upon the issues raised on the petition or cross petition entitled the vendors to recover on either of these grounds, then the conclusion of the district court must be sustained. To determine these questions, resort to the very voluminous record is necessary.

V. It is not necessary to allege conspiracy in order to prove similar transactions. Only enough need be stated to warrant the relief prayed. If the issues presented involve the intention or good faith of the
8 defendants, then, as bearing thereon, evidence is admissible of like transactions at or about the time, or that the act complained of is a part of a series of similar occurrences. If Adams had purchased but one small bill of goods through misrepresentation or concealment, it might well be argued that there was no intent to defraud, because of the small profit. But when it appears that this is only one of a series of different purchases, made under similar circumstances, and a part of a scheme to accumulate goods valued at thousands of dollars, on credit, then his fraudulent purpose is apparent. *Bigelow, Fraud*, 160; *State v. Brady*, 100 Iowa, 191; *Rowley v. Bigelow*, 12 Pick, 306; *Insurance Co. v. Armstrong*, 117 U. S. 591 (6 Sup. Ct. Rep. 877); *Schofield v. Shiffer*, 156 Pa. St. 65 (27 Atl. Rep. 69).

VI. The insolvency of A. A. Adams during 1894 is fully established by the evidence. According to his own testimony, he had a stock of fifteen thousand dollars in the spring, and owed the National State Bank two thousand, seven hundred and fifty dollars, and his
9 brother, as trustee, about sixteen thousand dollars. Besides this, the evidence tends to show that he was owing, on bills not due, in the neighborhood of five thousand dollars. By other witnesses the value of the stock at that time was placed at from eight thousand dollars to twelve thousand dollars. Looking

at the record in the most favorable light, it indicates that he did not have property sufficient to satisfy his debts at any time during the year. When F. O. Adams took the invoice in November, 1894, the stock amounted to twenty-four thousand, seven hundred and sixty-eight dollars and ninety-seven cents. At that time A. A. Adams owed at least twenty thousand, one hundred and eighty-six dollars and seventy-two cents for goods purchased, and twenty thousand and eighty-three dollars to the bank and the trustee, making the excess over his liabilities fifteen thousand, five hundred and ten dollars and seventy-five cents. Adams explains this by saying that he did not know he owed his brother so much. All but three of the notes to F. O. Adams, as trustee, were

10 in his handwriting, and, as he kept a set of books, he must have known approximately what was due. From these facts, and his concealment of the amounts due the bank and the trustee from his creditors and the commercial agencies, we are satisfied he was insolvent, and was fully aware of his financial condition.

VII. The evidence shows that A. A. Adams had been credit man in his father's wholesale house for many years, and understood that wholesale dealers based their credit on reports gathered from commercial agencies. That they so did is proven. The representations a business man makes to commercial
11 agencies relating to his business or pecuniary responsibility are expected to be communicated to others and to be acted upon. The very business of a commercial agency is to obtain such information and communicate it to its patrons. Any one making statements to such an agency, relating to his business or responsibility, must know and be held to intend that whatever he represents will be communicated to such of its patrons as may have occasion to inquire. When

these representations are communicated to a patron of the agency, and he relies on them in selling, and they are false, he may rescind the sale. *Stevens v. Ludlum*, 46 Minn. 160 (48 N. W. Rep. 771); *Lindauer v. Hay*, 61 Iowa, 663; *Carvill v. Jacks*, 43 Ark. 454; *Booth v. Wonderly*, 36 N. J. Law, 250; *Eaton v. Avery*, 83 N. Y. 31; *Lennessee County Sav. Bank v. Michigan Barge Co.*, 52 Mich. 164; 8 Am. & Eng. Enc. Law, 643. In 1893, Adams made a statement to Bent, as agent of the American Boot & Shoe Reporting Company, in which he represented his stock to be of the value of sixteen thousand dollars; outstanding two thousand dollars; owing for goods on spring deliveries, not due, six thousand dollars; but gave no account of his indebtedness to his brother as trustee or to the bank. At first he declined to give any information, but finally did so. He knew its purpose, and, by concealing his indebtedness, obtained a credit he could not have otherwise had. Fifteen of

the vendors sold goods to him on the faith of this report. It is said, however, that it was made nearly a year before the purchases. But, according to defendant's testimony, his business continued the same, and he allowed the report to continue and remain unchanged, knowing it was being used by the trade as a basis of credit. All of these vendors were entitled to rescind their contract of sale. *Lindauer v. Hay, supra*. To the agent of the American Shoe & Leather Association he represented that he owed no overdue bills for merchandise, and his assets exceeded his liabilities. No mention was made of the indebtedness in controversy. Geo. H. Lewis & Sons sold in reliance on this report, and should have the relief prayed.

VIII. The P. Cox Manufacturing Company requested Adams to make a statement as a basis of credit, and he answered that he owed only three hundred and fifty dollars, not yet due, and that the National

Shoe & Leather Association could not find a cent of indebtedness against him except this. Here, to an inquiry calling for his true financial condition, he responded, deliberately concealing an indebtedness exceeding the value of his stock. He referred E. H. Stearns & Co. to the above letter, and they sold in reliance on the statements it contained. E. P. Reed & Co., relied on the statement to their agent that his stock was worth seventeen thousand dollars, and he did not owe to exceed five thousand dollars. It seems hardly necessary to add that each of the vendors were entitled to rescind the sale owing to Adams' fraudulent concealment of his indebtedness.

IX. It is insisted by the appellants that the defendants made no statement to the agent of R. G. Dun & Co., or Bradstreet Commercial Agencies, and hence any information coming from them was not disseminated by his authority. The evidence, however, conclusively shows that he knew just what these reports were, and referred vendors to them, and also to the agencies. To Wallace, Elliott & Co. he expressly suggested that R. G. Dun & Co. had a resident agent, who was well qualified to give him information. To the agent of Roney & Berger and E. A. Stark & Co. he said the rating of Dun & Co. of ten thousand dollars was correct, and he did not owe five thousand dollars on the stock. To Reynolds & Co. he wrote that he was not advised what mercantile agencies they used as a basis of credit, but Dun & Co. and Bradstreet both had resident agents, and he thought he could satisfy them. To Frank, Herman & Co. he suggested that Dun & Co. and Bradstreet had resident agents in the city, to whom they might wish to refer. To Medlar-Holmes Shoe Company he again made the same suggestion. Thus it appears that he not only knew the information being

disseminated by the agencies, but approved it as correct. The reports of Dun & Co. indicated the value of his assets over liabilities at five thousand dollars to ten thousand dollars, and those of Bradstreet at from three thousand dollars to five thousand dollars, with no intimation of the large indebtedness to the bank or trustee. Those firms which he referred directly to the Dun & Co. and Bradstreet agencies, and who sold in reliance on the information derived therefrom, were deliberately deceived, and may rescind their sales.

X. Seventeen other firms sold goods in reliance on information obtained in the credit books or special reports of R. G. Dun & Co., or Bradstreet, or both. Adams had made no direct statement to these agencies, and had not referred the firms to them. It is
14 true he knew the information they were giving, and to other concerns approved it as reliable. But, so far as these vendors were concerned, he neither gave the information, nor authorized its use by them, and they cannot base a recovery on the charge that the goods were obtained by false representations through these agencies. See *Dorman v. Weakley*, (Tenn. Ch. App.) 39 S. W. Rep. 890. Again, the defendant urges that many of the vendors were not subscribers to the agencies relied on. A careful examination of the evidence shows that all but two were either subscribers or received special reports. One of these referred to the credit book of Dun & Co., and the other
15 to that of the American Boot & Shoe Reporting Company. The contract of the latter company is not set out. Presumably the information gathered by it for that particular line of trade was for those connected therewith, and the vendor rightly used its reports. *Eaton v. Avery, supra*.

XI. But Adams knew that the reports of Dun & Co. and of Bradstreet were being used as a basis of

credit, and, while the seventeen vendors had not been authorized by him to rely on their reports, this
16 evidence is material as bearing on the intention he had in purchasing goods. The fact that he made express representations when necessary to aid him in accumulating an immense stock of goods will aid in determining the purpose he had in buying of the more confiding wholesale dealers. As bearing on his purpose, evidence of the entire scheme and the methods resorted to may be considered. Now, he bought the goods in small lots, as in the ordinary course of business, from sixty-three houses, knowing that credits, if extended, would be on the basis of his rating with the commercial agencies. To many of these he directly misrepresented his financial condition, and did so to others through agencies. When making purchases, he knew he was insolvent. He bought and received goods to the value of at least ten thousand dollars for fall deliveries more than ever before. His sales for the year up to November 20, 1894, were but eight thousand and fifty-nine dollars and forty-four cents, and yet he ordered twenty-two thousand dollars' worth of goods. Adams attempts to explain these purchases by saying he expected to open another store, but he had never mentioned the matter to his creditors, had made no arrangements for storeroom, and had merely spoken to
17 Reilley about managing it. Besides, he made purchases of goods similar to large amounts he then had, after he was aware Reilley would not be with him. Again, he purchased goods out of season,—that is, those for fall delivery which could not, in the ordinary course of business, be sold till spring,—and of some lines in unusual quantities. The bills matured between January 1st and April 1st of the following year, and he must have known that it would be utterly impossible to pay but a fraction of them when matured.

He continually urged the necessity of early delivery during September and October. These facts and circumstances lead to but one conclusion, and that is that he was accumulating an immense stock of goods for a retail dealer, with no reasonable expectation of paying therefor. The demand of Stearns & Co for the immediate payment or security of its bills of eight hundred dollars was the excuse, rather than the cause, of executing the mortgages. The evidence amply supports the conclusion of the district court that the purchases were made with the intention of cheating the sellers out of the purchase price.

XII. It should be stated that A. A. Adams denies making the representations heretofore referred to, and says that he did not regard the debts to the bank and his brother, as trustee for his brother and sisters, as affecting his credit. His letters, however, confirm the evidence of the various agents, and his statements concerning the debts, in view of his intelligence and his long business experience, are unworthy of belief. The mortgage to the bank has been paid, and a sufficient amount remains in the hands of F. O. Adams to satisfy his obligation, to discharge the indebtedness of A. A. Adams to the amount of two hundred and fifty dollars, and to pay any costs chargeable in the foreclosure proceedings. To the contention of the appellants, that under the bank mortgage its agent was entitled to costs and nominal damages, it may be said that, even though true, this would not warrant a reversal. The judgments against E. H. Cowles & Co. and Ronney & Berger are REVERSED and in all other respects the decree of the district court is AFFIRMED.

LOTTIE A. ORR v. A. J. MOORE, *et al.*, Appellants.

Suit for Purchase Price: ESTOPPEL: An owner of certain property agreed with a purchaser to transfer the property to him under a deed warranting against all incumbrances. The deed was to remain in escrow until the grantee had paid certain taxes which were liens on the land, and it was delivered to him upon his representation that all were paid. *Held*, that a special assessment which the grantee had not paid at the time when the deed was delivered to him, but which he subsequently paid without protest, and which he did not present as a claim against the grantor's estate after the grantor's death, cannot be set up as a counterclaim in an action to collect the amount due on the purchase price.

Appeal from Woodbury District Court.—HON. J. F. OLIVER, Judge.

SATURDAY, MAY 14, 1898.

THE plaintiff is the surviving widow of C. C. Orr, deceased, who died February 12, 1893. On the fifteenth day of July, 1891, C. C. Orr and wife executed to A. J. Moore, as trustee for Hornick, Hess & Moore, a warranty deed for certain premises; and Moore, for the purchase price, executed to C. C. Orr twenty notes, and a mortgage on the conveyed premises to secure their payment. The notes were paid, except the last of the series, which is for one thousand, nine hundred and forty dollars, with interest; and this action is upon said note, and asking for a foreclosure of the mortgage. The plaintiff now owns the note and mortgage. The answer admits the making of the note and mortgage, and, by way of counterclaim, says that by the terms of the deed there is a covenant against incumbrances,

and that at the date of the deed there were incumbrances on the land, because of special assessments for street improvements, so that the amount thereof, already paid by Hornick, Hess & Moore, and to be paid, amounts to one thousand, seven hundred and nineteen dollars and sixty cents; and there is an offer to pay any difference that may be found in favor of plaintiff between the amount of such incumbrance and the amount due on the note. In a reply it is made to appear that it was agreed that the defendants should pay off all taxes and special assessments then a lien on the land before the deed should be delivered, and that, in pursuance of such agreement, Orr delivered the deed to the conveyancer to be delivered upon the payment of such taxes and assessments, and that the same was delivered upon the representations of defendants that such payments had been made; and it is urged that defendants are estopped to claim damages because of a breach of the covenants in the deed. Other matters are pleaded, which, if necessary, will be noticed in the opinion. The district court gave judgment for plaintiff for the amount due on the note, with a decree of foreclosure. The defendants appealed.—*Affirmed.*

J. S. Lothrop for appellants.

Lynn & Foley for appellee.

GRANGER, J.—There is some contention as to the competency of the evidence in the record, which we need not notice, as we may disregard what appears to be improperly there, and portions of it must be disregarded. The main contention in the case by appellants is as to the conclusiveness of the deed on the question of their right to recover for a breach of its covenants; the point being that its terms, being express

covenants against incumbrances, cannot be contradicted or changed by parol evidence, and many authorities are cited, claimed to support such a rule as applicable to this case. The claims and citations, however, do not appear to be directed to the particular issue we have set out in the statement, and which we think is controlling in the case, with the facts as we find them to be. That, before the deed was made the parties understood—in fact, agreed—that the land should be taken without any incumbrances that might be against it, by way of assessments, we have no doubt whatever. The acts of the parties for a long time after strongly sustain such a conclusion. What we wish to be understood as saying is this: That the parties well understood that Orr was to pay no incumbrances that might be on the land. When the deed was made, there were taxes that were an incumbrance; but defendants did not want the deed to show an exception as to the covenants of warranty because it was the purpose to plat the land into lots for sale; and so the deed was to be held by Henderson, who wrote it, till the incumbrances should be removed, and then to be delivered. Defendants paid the taxes, other than special, and claimed the deed; and Henderson, not having thought about special assessments, delivered the deed, when, had he known or thought of them, he would not, for he so says; and he testifies that the agreement was that all liens and incumbrances were to be paid by the parties getting the deed, before it should be delivered. He is somewhat contradicted in this, but the corroborating facts sustain him. It was really a deal commencing in 1889, when Orr gave possession of the land,— to other parties, it is true; but these defendants succeeded the former purchasers, with slight modifications of the contract; and the conveyance to defendants was a practical carrying out of the original agreement to deed, at which time the assessments in question were not liens. After the delivery of the deeds, as

the installments of the assessments became due they were paid by defendants, with no complaint. In 1893 Orr died; and his estate was settled,—being solvent,—with no claims because of such a breach of his covenants being presented. We speak of these facts as sustaining the conclusion that, when the deed was left with Henderson for delivery when incumbrances should be removed, it was understood that all incumbrances were included. It may be true that neither party at that time thought of these special assessments; but the acts of defendants in making these payments in the way they were made supports the conclusion that it was understood that Orr was not to pay any incumbrances, and that, even though defendants innocently represented the incumbrances as paid, the obtaining of the deed was wrongful, and should estop a claim in direct violation of the agreement upon which it was to be delivered. The intention was that the deed should be taken with the incumbrances paid, so that Orr could not be liable under the terms of his covenants in the deed; that is, that the facts should be made to harmonize with the conditions as expressed in the deed, and then the deed become operative. The most favorable state of facts to appellants is that the deed was called for, and accepted, believing the agreement as to removing incumbrances had been complied with; and, if this is true, no known rule of law would permit them to take advantage of such a delivery to avoid their obligations. We do not overlook the fact that there is some testimony to show that before Orr died his attention was called to the matter, and he acknowledged his liability for assessments, but such a fact does not appear by competent proof. The judgment is **AFFIRMED**.

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THE FRANKLIN SAVINGS BANK v. C. J. COLBY, ANNA W. COLBY, SOUGHEGAN NATIONAL BANK, AMERICAN EXCHANGE NATIONAL BANK, AOHUELOT NATIONAL BANK, *et al.*, Appellants.

Payment: MORTGAGE: *Principal and agent.* A mortgagee of land authorized by one to whom he has assigned the mortgage to collect the notes secured thereby, is not authorized thereby to receive other notes in payment.

SAME: *Notice.* That one of several notes secured by mortgage is paid a considerable time before maturity to the mortgagee who is authorized by the assignee of the mortgage to collect the notes, is not necessarily notice to the assignee that the mortgage has been satisfied, and other notes and a mortgage taken in lieu thereof by the mortgagee.

Payment: BILLS AND NOTES: *Innocent Purchaser.* The maker of notes secured by mortgage, who gives a second series of notes and mortgages to the mortgagee, knowing that the first notes have been transferred, is not thereby relieved from liability to innocent holders for value of such first notes.

SAME: *Assignment.* Where a mortgage and the notes secured thereby are assigned by the mortgagee, and the assignor does not record his assignment, and subsequently the mortgagee, without authority from the assignee, takes another mortgage on the same property, and new notes in renewal of the first mortgage and debt, and releases the first mortgage of record, and transfers the new notes to a first national bank, but does not inform the bank of the security, and does not assign it, the second mortgage does not follow the debt it was given to secure. National banks are forbidden by act of congress to deal in real estate securities as original investments

ELECTION. The assignee of a mortgage did not record its assignment, and the mortgagee subsequently, without authority, released the mortgage, and took a new mortgage and notes in renewal of the old ones, and sold the new notes, and afterwards made a trust deed for the benefit of his creditors including the assignee of the first mortgage. The assignee of the first mortgage placed his assignment on record, and began action to foreclose. *Held*, that the contribution toward the expense of foreclosing the trust deed, made for the assignee by one whose authority to do so is not shown, is not an election to take under the trust deed.

Release: MORTGAGE. A mortgagee of land cannot rightfully release 1-2 the mortgage after an assignment thereof, unless authorized by 8 the assignee.

Evidence. Evidence given on one trial is inadmissible on a second 7 trial in the absence of any explanation for the failure to call the witnesses who gave the same.

Appeal from Pottawattamie District Court.—HON.
WALTER I. SMITH, Judge.

SATURDAY, MAY 14, 1898.

ACTION in equity for judgment on one promissory note executed by the defendants C. J. and Annie W. Colby to Kimball-Champ Investment Company, and for decree foreclosing a mortgage on real estate executed by said Colbys to secure the same. The issues and facts appear in the opinion. Judgment and decree were rendered in favor of the plaintiff. Defendants appeal.—*Affirmed.*

Stone & Dawson for appellants.

Sims & Bainbridge for appellee.

GIVEN, J.—I. Appellant's counsel state the facts as follows: February 14, 1889, the principal defendant, C. J. Colby, made his three notes, aggregating eight thousand dollars, due in one, two, and three years, to the Kimball-Champ Investment Company, and gave a mortgage securing the same on the property 1 in controversy, to the company. March 5th the company sold the notes to the Franklin Savings Bank, delivering at the same time a blank assignment of the mortgage. The assignment remained in blank until it was returned to Council Bluffs, presumably about the time it was recorded, and then the name of the Franklin Savings Bank as assignee was filled in by

A. D. Annis, of Council Bluffs. In January, 1890, before the first note was due, J. F. Kimball, president of the Kimball-Champ Investment Company, entered into negotiations with Colby to take up the mortgage in suit, and have him execute a new one in place of it. The company was the regular correspondent of the Franklin Savings Bank in Council Bluffs, and by the uniform course of business had entire charge of the collection, management, and renewal of the paper from this locality owned by the bank, and sold to it by the company. Kimball told him the company had one note (the one that would come due the next month), and that the other two, which were not due for more than a year and two years, respectively, were East. Colby agreed to the renewal, and early in February, and before the first note came due, Colby executed and delivered to the company new notes and a new mortgage for the same amount, the old note was delivered up, and a release of the old mortgage in the following form, "Released, February, 1890. J. F. Kimball, President," was written in the margin of the record of the old mortgage, which was in the name of the Kimball-Champ Investment Company at that time, no assignment having been filed by the Franklin Savings Bank or any other party. The new notes were shortly afterwards sold or delivered as collateral to the appellant banks. The second note of the original issue was afterwards delivered up according to agreement by the plaintiff and Kimball to the defendant, but the third note was not, and is the one now sued upon. In July, 1891, Kimball and Champ, knowing that they were liable to the plaintiff for the Colby note still held by it, and not paid by them, and being about to fail, made entries on their books, both personal and of the company, formally assuming a personal liability to the plaintiff for the amount of the note. Immediately thereafter they made a general assignment of the company,

and at the same time executed a trust deed to A. T. Elwell securing the amount due the plaintiff with a number of other debts similarly secured. October 10, 1891, an action to foreclose this trust deed and to recover the amounts due was brought by the trustee, all except one of the beneficiaries accepting under it, and this plaintiff contributing with the others to the maintenance of the suit. October 30, 1891, the assignment to the plaintiff was placed on record. July 1, 1893, the suit of Elwell v. Kimball being still pending and undecided, this suit was begun. October 25, 1893, the Elwell suit was decided in favor of the Omaha National Bank, which claimed the property therein involved on an attachment, and is now pending an appeal in this court. No disclaimer of an interest in the Elwell trust deed, or withdrawal from the suit to foreclose it, has ever been made by the plaintiff. Appellee's counsel concede this statement to be substantially correct except in the following particulars: They deny that the investment company was the regular correspondent of the plaintiff bank, and had charge of the collection, management, and renewal of the paper from the locality of Council Bluffs which had been sold to it by the investment company. They deny that Kimball told Colby, at the time of the transaction in question, that he (Kimball) then had one of the notes. They also deny that the plaintiff bank accepted, as one of the beneficiaries, under the Elwell trust deed, or that it contributed to the maintenance of the suit to foreclose that deed.

II. We first inquire as to the release of the first mortgage. Plaintiff insists that it is not a satisfaction of the mortgage, for that it does not purport to have been executed for, nor by authority of, the investment company. Taking the mortgage and release
2 together, there can be no doubt but that Mr. Kimball executed the release as president of the company, and for it under his authority as president.

If this company was claiming under the mortgage, the release might be sufficient as against it, yet not as to this plaintiff. By the transfer of the notes and mortgage plaintiff took all rights of the investment company therein, and that company could not thereafter rightfully release the mortgage unless authorized by the plaintiff. We do not think that any such authority is shown. No doubt Mr. Kimball, acting for the company, in taking the second notes and mortgage, and in disposing of said notes, and in entering the release of the first mortgage, intended that the company should become debtor to and would pay the plaintiff the notes which it held; but there is no evidence that the plaintiff authorized such an arrangement. The extent of the authority given to the investment company was to collect the notes which plaintiff purchased from it, but this did not authorize the company to receive other notes in payment. However honest the purpose may have been in taking the second notes and mortgage in satisfaction of the first, and in entering the release, it was clearly unauthorized, and a fraud upon the plaintiff.

4 It is contended that by receiving payment of the first and second notes through the investment company the plaintiff ratified its said action. Plaintiff collected notes purchased from the company through it, sometimes sending notes, at maturity for collection, and sometimes receiving payment before the notes were sent, in which event the notes were surrendered. Plaintiff having received payment of the first two notes, they were surrendered to Mr. Colby. That one of them was paid a considerable time before maturity did not necessarily indicate to plaintiff that other notes and mortgage had been taken, and defendants' mortgage satisfied. Indeed, plaintiff knew nothing of that transaction until long after the payments were received. There

was no ratification of the acts of the investment company by receiving the payments of the first two notes. It is further insisted that plaintiff elected to take under the trust deed, and thereby ratified the acts of the investment company. As will be seen further on, we are of the opinion that the plaintiff did not so elect, and therefore did not ratify the acts of the investment company by such an election. Our conclusion upon this inquiry is that the plaintiff neither authorized nor ratified the taking of the second notes and mortgage in satisfaction of the first, nor the entering of said release; and that, if nothing further appeared there could be no question of plaintiff's right to a foreclosure of its mortgage.

III. It further appears that the second series of notes was transferred to the defendant banks,—to one as collateral and to the others as purchasers,—before plaintiff's assignment of the first mortgage was recorded, and without any knowledge on the part of the said banks of that assignment. In *Jenks v. Shaw*, 99 Iowa, 604, this court, after a review of the cases, said, in conclusion, "that the rule in this state is that the assignee of a debt secured by mortgage must give notice on the record of the transfer to be entitled to preference over subsequent purchasers or mortgagees without notice of the transfer." The case also recognizes the rule that the security follows the debt without assignment; that is, that where a transfer of the security is intended, it follows a transfer of the debt without an assignment of the security. Ordinarily it is so intended, but not necessarily so. It does occur that notes secured by mortgage are assigned and received without intending thereby to convey any interest in the mortgaged property. We now inquire whether
5 the defendant banks are subsequent purchasers or mortgagees, so as to be within the rule announced in *Jenks v. Shaw*. In appellants' abstract

it is said as follows concerning the transfer of the second series of notes to the defendant banks: "The receipt of the notes was acknowledged by all the defendant banks by letters or credit slips. The cashiers or other officers acted for the banks. They never saw or had in their possession the original mortgage given by Colby and wife to secure these notes before July 21, 1891, and did not have it before them when they accepted the notes. No abstract of title to the property covered by the mortgage was submitted when the notes were purchased, and no opinion as to the title was ever procured from any attorney. Each of the defendant banks is a national bank." It does not appear that any mention was made of this second mortgage to any of the defendant banks until long after the transfer of the notes had been made, and then only to one of them in a letter saying, "The Colby notes that we put in are secured to us by first mortgage on valuable real estate near the city." We are in no doubt but that the investment company intended to transfer, and the defendant banks to receive, these second notes without any reference whatever to the mortgage. Two quite satisfactory reasons appear for this conclusion: The investment company, in taking the second mortgage without authority, might well hesitate to include it in the transfer; and the banks, being national banks, and forbidden by act of congress from dealing in real estate securities as original investments, we may presume did not desire the mortgage security, but rested upon the indorsement of the investment company. Such being the facts, the security did not follow the transfer of the debt, and the defendant banks acquired no interest in the mortgaged property, and are not within the rule of *Jenks v. Shaw*. They were not deceived into taking these notes by the plaintiff's omission to record its assignment of the first mortgage, nor were they prejudiced thereby.

IV. In the trust deed executed to Mr. Elwell, plaintiff and others are named as beneficiaries, the plaintiff to the amount of two thousand, seven hundred dollars. It does not clearly appear upon what this admitted indebtedness is based, but we are inclined to think that it was on account of the note in suit.

6 The plaintiff knew nothing about the execution of this trust deed, but it is contended that thereafter it elected to take under that deed, and it is therefore estopped from now claiming under the first mortgage. The evidence upon which this claim is made is that of Mr. Congdon and Mr. Parrish, given on the trial of the case to foreclose the trust deed, and of a certain letter and a decree of the court in that case.

7 The testimony of Mr. Congdon and Mr. Parrish given on the other trial was clearly inadmissible, and must be excluded under the objection of the plaintiff that it is incompetent, immaterial, and not the best evidence. No reason appears why these witnesses were not called upon the trial of this case. The letter

8 relied upon is as follows: "A. W. Sulloway, Pres. Frank Proctor, Cashier. The National Bank of Franklin, N. H. Franklin Falls, N. H., June 6, 1892. G. A. Litchfield, Esq., Tr., Keene, N. H.—Dear Sir: Herein inclosed find our dft. on Boston for \$118.97 in pmt. of amt. due from the Franklin Savings Bank and the Franklin National Bank acct. of retainer of Messrs. Congdon & Clarkson, in re Elwell trust deed. We understand from Mr. J. W. Squire that you have advanced this amount for our acct. Sav. Bk., \$85.89; Nat. Bk., \$33.08,—\$118.97. Very respectfully, Frank Proctor, Cashier." Plaintiff's objection to this letter as incompetent must also be sustained, for it will be observed that it does not even purport to be from, nor by authority of, the plaintiff, but from one of the other beneficiaries named in the trust deed, the National Bank of

Franklin, N. H. True, it says, "in pmt. of acct. due from the Franklin Savings Bank and the Franklin National Bank," but it does not appear that the payment was authorized by the plaintiff. It is said that these two banks were doing business in the same place, and were practically one concern. If this be conceded, still the authority of the plaintiff for the payment is not shown with that definiteness that it should be to warrant us in holding the plaintiff to have elected to take under the trust deed, and to have surrendered its rights under its mortgage. As against the claim that plaintiff so elected, we have the facts that within a few days after the action to foreclose the trust deed was commenced the plaintiff filed its assignment of the first mortgage for record, and six months prior to the trial of that case commenced this action. Surely, if the plaintiff had intended to rely upon the trust deed, it would not have filed its assignment for record, and would not have commenced this action. As already stated, we think the record fails to show an election by the plaintiff to take under the trust deed. What we have said fully disposes of the case as between the plaintiff and the defendant banks, and leads to the conclusion that the decree of the district court as between them is correct.

V. The defendants C. J. and Annie W. Colby gave the second series of notes and mortgage knowing that the first notes had been transferred, and that two of them were then in other hands than those of the investment company. They seem to have acted upon the confidence that they had in the investment company that it would protect them against said two outstanding notes, but, unfortunately for them, the insolvency of that company has rendered it unable to do so. If the second notes were given by them as payment for the first, they then should have required the surrender of the first at the time they delivered the

second. If given, as we think they were, in reliance upon the solvency of the investment company, then surely they cannot be heard to question their liability to innocent holders for value of said notes without notice. Our conclusion upon the entire record is that the judgment of the district court should be **AFFIRMED**.

F. B. FOX v. S. M. GRAY, *et al.*, Appellants.

Mortgage: RIGHT TO FORECLOSE: Default in Interest. A mortgage subsequently made in pursuance of a written agreement to do so
2 when a note was executed which it secured, provided that on
3 default in payment of interest the whole debt was to become due
5 and collectable. *Held*, that the fact that no such provision for maturity and collection was made in the note, was no defense to a foreclosure, regardless of the fact that the mortgage was in pursuance of a written agreement.

SAME. A mortgage containing a condition that failure to pay any
2 installment of principal or interest when due, renders the mort-
3 gage subject to foreclosure at the holder's option, may be fore-
5 closed for a failure to pay an installment of interest, although the note secured by the mortgage states that interest is payable annually, and that interest when due is to become principal and draw a specified rate of interest.

CONSIDERATION. The makers of a note agreed to secure it with a mortgage upon certain property as soon as they secured title thereto, and by agreement the payee was to transfer to the makers
4 of the note a certain judgment and note, which she did. *Held*, that the assignment of the judgment and transfer of the note were a sufficient consideration for the subsequent execution of the mortgage.

Appeal. The cost of an additional abstract filed by appellee will be taxed to him where it merely presents matter about which there
1 is no question, though the amendment was not stricken from the files, on motion.

Appeal from Linn District Court.—HON. WILLIAM G. THOMPSON, Judge.

SATURDAY, MAY 14, 1898.

THE defendants executed to plaintiff a promissory note, of which the following is a copy: "\$600.00. Marion, Iowa, March 1, 1895. On or before three years after date, for value received, I promise to pay F. R. Fox or order six hundred dollars, payable annually, at the rate of seven per cent. per annum until paid; interest, when due, to become principal, and draw seven per cent. interest. If this note is not paid when due, I agree to pay all reasonable costs of collection, including attorney's fees. S. M. Gray. J. M. Gray." At the time of the execution of said note, the defendant had contracted for the purchase of certain real estate, and they entered into a written agreement with plaintiff that when they obtained the title they would execute the mortgage thereon to secure payment thereof. Thereafter defendants got title to the real estate, and executed such mortgage to plaintiff. The material parts of this instrument are as follows: "To be void on condition that S. M. Gray and J. M. Gray shall pay or cause to be paid to said F. R. Fox or assigns their certain promissory note, dated March 1, 1895, for \$600, due on or before three years after date, with interest at seven per cent. from date, payable annually. Failure to pay any installment of principal or interest when due forfeits the unexpired time, and renders this mortgage subject to foreclosure, at the option of the holder." On August 1, 1896, plaintiff brought this action on said note, and for the foreclosure of the mortgage; alleging that the interest due March 1, 1896, was unpaid, and that he exercised the option to claim the whole amount of principal and interest as due. There was a demurrer to the petition on the ground that the note disclosed by its terms, that it was not due. This was overruled. Defendants answered, setting up the same claim. Plaintiff's demurrer to the answer was sustained. Defendants

electing to stand thereon, a judgment and decree were entered in plaintiff's favor, and from this action of the court defendants appeal.—*Affirmed.*

C. J. Haas for appellants.

Richard A. Stuart for appellee.

WATERMAN, J.—Defendants move to strike appellee's additional abstract from the files and tax the cost thereof against him. This motion will be sustained, to the extent of taxing the costs of this abstract to the appellee. It presents only the acknowledgment of the mortgage, about which there was no question, and which was therefore wholly unnecessary.

II. Appellee's denial of the correctness of appellant's abstract, and his objections to the assignments of error, are without merit. This brings us to the real issue involved.

III. The claim of defendants is that by the terms of the note, the interest was not to be paid annually, but that they had the option to so pay it if they chose; if they did not so elect, the interest was to become principal, and could only be collected when that fell due. They rely for support in this contention upon *Wood v. Whisler*, 67 Iowa, 676. In that case, however, it is said, "Neither the note nor mortgage provides for the payment of interest annually." This we regard as an important distinction, for in the case at bar both the mortgage and note provide that the interest shall be "payable annually." We think this case is ruled by that of *Carter v. Carter*, 76 Iowa, 474.

IV. But it is insisted by appellants that the note does not provide that default in the payment of interest shall make the whole debt due and collectible, and that

the provisions of the mortgage cannot be considered in this connection. The reason given for this contention is that the mortgage was not executed contemporaneously with the note, and there was no consideration for it, so far as it attempts to change the original contract. There is no foundation for this position. The mortgage was made in pursuance of a written agreement to do so, which was executed when the note was given. It was as much a part of the original transaction as though made at the same time. It was voluntarily executed by defendants, and was accepted and acted upon by plaintiff. We do not think defendants now are in any situation to claim that they are not bound by its terms. But it seems there was a valuable and independent consideration for the mortgage, if it were needed. It appears by the written agreement made at the time of executing the note that plaintiff was the owner of a certain judgment and note against one Daniels, which he was to transfer to defendants as a part consideration for the note in suit, and that he was to retain these in his own name and possession until the mortgage was executed, and then deliver them to defendants. Defendants set up these facts. They allege performance of this agreement on their part, and they do not deny that plaintiff performed it on his part. The assignment of the judgment and the transfer of the note would surely be a sufficient consideration.

V. A stipulation in the mortgage, alone, that a failure to pay interest when due shall cause the whole debt to become due, is sufficient.

Smalley v. Ranken, 85 Iowa, 612; *Hawes v. Insurance Co* (Mich.) 67 N. W. Rep. 329.

We discover no error in the action of the trial court, and its judgment is AFFIRMED.

W. L. ELWOOD, Appellant, v. J. A. McDILL.

Sale. A purchaser of a horse under a warranty that if it is not as warranted it may be returned and exchanged for another horse or
 6 the purchase price be refunded, has the option to either return the horse if not as warranted, or to retain it and to recover damages caused by the breach of warranty.

DAMAGE. A purchaser of a stallion warranted to be a "good foal
 5 getter," cannot recover the cost of keeping the horse for breeding
 7 purposes after he learns it is not as warranted.

INTEREST. A note with a specified amount, with interest, given for the purchase price of a horse under a contract providing for the
 4 return of the horse if not as warranted, and for the taking of another horse in lieu of him, with a credit on the note on account
 7 of the exchange, bears interest from its date instead of from the date of the exchange made in accordance with the contract.

Evidence. In an action on a note given for the price of a stallion, where the maker defended on a breach of warranty that the stal-
 1 lion was a reasonably sure foal getter, he was properly permitted to explain his written statement to the seller that the horse was in good condition, to mean that he was in good flesh and health; witness not knowing whether he was a foal getter; and the two statements are not contradictory, at all events.

HARMLESS ERROR. Hearsay evidence is not prejudicial where the
 2 same fact is subsequently established without contradiction.

EXCLUSION: Review. Refusal to permit an answer to a question whether a certificate of warranty was given with a certain horse
 3 on its sale, is not ground for reversal, as it would not be competent by an answer to such question to prove the character of the instrument given.

Appeal from Mills District Court.—HON. A. B. THORNELL, Judge.

SATURDAY, MAY 14, 1898.

ACTION at law to recover amounts alleged to be due on two promissory notes. There was a trial by jury, and verdict and judgment for the defendant. The plaintiff appeals.—*Reversed.*

105	437
123	558
105	437
136	283
105	437
144	399

Harl & McCabe and Patrick & Chantry for appellant.

John Y. Stone, L. T. Genung and W. S. Lewis for appellee.

ROBINSON, J.—Each of the notes in suit was given by the defendant to the plaintiff on the ninth day of November, 1887, for the sum of one thousand and fifty dollars, with interest thereon at the rate of seven per cent. per annum. One was due July 1, 1889; and the other one year later. The notes and a stallion owned by the defendant, valued at four hundred dollars, were given to the plaintiff for a French stallion, known as "Freycinet," valued at two thousand five hundred dollars. As a part of the transaction, the plaintiff gave to the defendant a written warranty that Freycinet was sound, and a reasonably sure foal getter. The horse proved not to be as warranted, and in consequence was returned to the plaintiff in September, 1889, and the defendant then demanded his notes. He finally concluded to take another stallion, and selected one named "Caprice," which was delivered to him. Neither note was taken up, although five hundred dollars had been paid July 11, 1889, on the note which first became due; and the defendant states that Caprice was taken at the agreed price of one thousand eight hundred dollars, and that the plaintiff agreed to give the defendant a further credit on the notes, of seven hundred dollars. The terms on which Caprice was taken by the defendant are in dispute. He claims that, by verbal agreement, the warranty which applied to Freycinet was to apply to Caprice, while the plaintiff claims that the warranty of the last named horse was in writing. The evidence tends to show that Caprice was unsound, and not a reasonably sure foal getter, and in the fall of 1891 the

defendant disposed of him for about two hundred dollars. The defendant alleges that the consideration of the notes has failed, and, by way of counterclaim, he seeks to recover expenses of keeping the horses, and the damages sustained by reason of the breach of warranties given, to the amount of one thousand seven hundred dollars. The jury returned a verdict for the defendant in the sum of one thousand three hundred and fifty-nine dollars and ninety-five cents, but pending a motion for a new trial the defendant offered to remit all of the amount of the verdict in excess of eight hundred and fifty dollars. The motion was overruled and judgment was rendered in favor of the defendant for that amount.

I. The defendant admitted as a witness, that in September, 1890, he wrote a letter to the plaintiff, in which he said that Caprice was "in good condition." He was asked, notwithstanding an objection by the plaintiff, to state what he meant by that expression, and answered: "I meant the horse was in good flesh and health, apparently. Did not know September 6, 1890, whether he was a good foal getter or not." We
1 do not think the court erred in permitting the question to be answered. The answer given was not contrary to, but in harmony with, the statement contained in the letter. The question did not call for an answer in conflict with that statement, nor with the understanding which the plaintiff was entitled to rely upon respecting it.

II. The appellant complains of the admission of the testimony of one Bruen in regard to the number of mares served by Caprice which were with foal by him, on the ground that the testimony was hearsay. The
2 record shows clearly that the testimony was objectionable for the reason stated; but prejudice from its admission could not have resulted, because the facts sought to be proved by it were, in substance,

testified to by other witnesses, whose testimony was not contradicted.

III. A witness named Fisk, who was the superintendent of the stock farm of the plaintiff when Freycinet was exchanged for Caprice, and had something to do with the transaction, was asked to state whether a certificate of warranty was given with Caprice.

3 It is claimed by the plaintiff that such a certificate was given, and, if so, he was entitled to show that fact. An answer to the question might, perhaps, have been allowed on the ground that it was preliminary only; but it would not have been competent to prove the character of the instrument by the answer called for by the question. The form of the question was not unobjectionable, and we should not be inclined to reverse the judgment of the district court for its refusal to permit an answer.

IV. The appellant complains of the third paragraph of the charge. That instructed the jury, in effect, that, if Caprice was taken by the defendant at the agreed price of one thousand eight hundred dollars, the effect would be to credit on the
4 notes the difference between that sum and the price of Freycinet, or seven hundred dollars at the date of the exchange, in addition to the five hundred dollars paid in July, 1889, and that the plaintiff would be entitled to recover nine hundred dollars, with interest thereon, but only from the date of exchange, according to the terms of the note. In this the court erred. The testimony of the defendant showed that Caprice was taken under the contract for the sale of Freycinet, which provided for his return if not as warranted, and for the taking of another horse in lieu of him, and that the defendant was merely to have a credit of seven hundred dollars on his note on account of the exchange. No agreement

providing that the notes should only draw interest from the date of the exchange was shown; and, so far as the facts are disclosed by the record, the notes were to remain in force, with an additional credit thereon of seven hundred dollars, as of the date of the exchange.

V. The eighth paragraph of the charge, in regard to the measure of the defendant's recovery in case he showed a breach of warranty in the sale of Caprice, stated, in effect, that the defendant was entitled to recover the difference between the value of Caprice as he was when the contract of warranty was made, and what his value would have been had he been as warranted, if that was more than his actual value at the time, and that, if the horse was kept for breeding purposes, the defendant would also be entitled to recover such sum as he had expended in caring for and keeping the horse. The appellant
5 justly complains of the last part of the paragraph, because it did not limit the right of recovery for expenses to those which were incurred before the fact was known that Caprice was not a reasonably sure foal getter, but permitted a recovery for all the expenses of keeping him from the fall of 1889 until he was sold. The defendant knew within a short time after receiving him that he was unsound, and knew that he was not a reasonably sure foal getter, not later than the spring of 1891, and at some time during the first year he was used. The fact that the horse was unsound did not necessarily show that he was not a good foal getter, but the defendant was not justified in incurring the cost of keeping the horse for breeding purposes at the expense of the plaintiff, after knowing that fact.

VI. The contract of warranty given with Freycinet provided that, if he should not be as warranted, he might be returned, and if in as good condition as when

sold, exchanged for another horse of fair value, or the purchase price be refunded. It is claimed by the appellant that Caprice was taken subject to that warranty, and that it was the duty of the defendant to return him when he proved to be not as warranted. The contract did not, however, provide for the return of the horse, if
not as warranted, to the exclusion of other meth-
6 ods of procedure and other remedies. In that respect it is similar to the contracts considered in *Love v. Ross*, 89 Iowa, 400, and *Hefner v. Haynes*, 89 Iowa, 616, which were held to give to the purchaser the option to return the stallions purchased, or to retain them and recover damages caused by the breach of warranty.

VII. We have yet to consider the effect of the errors in the charge of the court to which we have referred. The interest of which the plaintiff may have
been deprived by the error in the third para-
7 graph may have amounted to about three hundred dollars. The cost of keeping Caprice for breeding purposes was at least four hundred and ten dollars a year, and he may have been kept nearly a year after the defendant knew that he was not a reasonably sure foal getter. The evidence as to dates is so indefinite that we are unable to determine what the jury allowed the plaintiff for interest, and what it allowed the defendant for keeping the horse for breeding purposes. Therefore we are unable to say what the errors amounted to, and cannot say that they did not exceed the amount of the verdict remitted. For the errors pointed out the judgment of the district court is
REVERSED.

S. A. HOYT v. A. U. QUINT, Appellant.

Guaranty: ABSOLUTE LIABILITY. One who was not a party to a note signed the guaranty written on the back of the note: "I guaranty payment. Demand, notice and notice of protest waived." *Held*, that the guaranty was absolute, and the guarantor could not plead want of notice and demand, and lack of diligence on the part of the payee in collecting from the payor, as a defense.

Appeal from Carroll District Court.—HON. Z. A. CHURCH,
Judge.

SATURDAY, MAY 14, 1898.

ACTION on the guaranty of a promissory note. Judgment for plaintiff and defendant appeals.—*Affirmed*.

Geo. W. Bowen for appellant.

F. M. Powers for appellee.

LADD, J.—The petition, filed August 12, 1896, alleges that J. M. and Lulu Boyce executed their promissory note, August 13, 1893, to S. A. Hoyt, for the sum of three hundred and sixty-eight dollars and eight-four cents, payable one year after date, and that defendant guaranteed the payment thereof in these words indorsed on the back thereof: "I guaranty payment. Demand, protest, and notice of protest waived. A. U. Quint." In his answer, filed April 3, 1897, the defendant averred that nearly two years before the beginning of this suit he requested the agent of plaintiff to collect the note of the maker, who at that time was solvent and had property subject to execution; that the plaintiff neglected to do so, and exercised no diligence in securing payment from Boyce; that since that time Boyce has

become insolvent, and said note cannot be collected; and that by reason thereof the defendant is released. The plaintiff demurred to this answer on the ground that the "defendant became an absolute guarantor for the payment of this note if not paid by the principal, and waived all conditions which might limit his liability as a guarantor. The court sustained the demurrer, and, defendant having elected to stand on the ruling, judgment was entered as prayed.

I. The guaranty was absolute. *Marvin v. Adamson*, 11 Iowa, 371; *Bank v. Gaylord*, 34 Iowa, 246; 1 Daniel, Negotiable Instruments, section 1769; Brandt, Suretyship, section 170. The guarantor of a promissory note is not entitled to have a demand made, as it is the duty of the maker to find the note and pay it at maturity. *Sabin v. Harris*, 12 Iowa, 87; *Reynolds v. Douglass*, 12 Pet. 497; *Allen v. Rightmere*, 20 Johns. 365. The defendant became absolutely liable upon the failure of Boyce to make payment. If entitled to notice, he was not discharged by want thereof, unless he suffered some detriment. But notice was expressly waived, and thereby he assumed to protect himself. The guaranty in such a case is as binding as an original promise, and the guarantor cannot plead lack of diligence as a defense. *Harvester Co. v. Tomlinson*, 58 Iowa, 129; *Fuller v. Same*, 58 Iowa, 112; *Wagon Co. v. Swezey*, 52 Iowa, 391; *Id.*, 63 Iowa, 520; *Cobb v. Little*, 11 Am. Dec. 72; *Bloom v. Warder*, 13 Neb. 476 (14 N. W. Rep. 395); *Hungerford v. O'Brien*, 37 Minn. 306 (34 N. W. Rep. 161.—AFFIRMED.

H. E. J. BOARDMAN, Appellant, v. THE MARSHALLTOWN
GROCERY COMPANY, C. M. CARR its President, and
D. T. DENMEAD its Secretary.

Right to Inspect Stock Book: ACTION. Code, 1873, sections 1076 to 1078, giving persons the right to inspect the stock books of any corporation, and requiring a posting of the by-laws, gives a right of action to anyone injured by a failure of the corporation to comply therewith.

DAMAGES. The value of plaintiff's time in endeavoring to secure the right to inspect the stock book of defendant corporation, and sums paid to his attorney therefor, are not recoverable as actual damages.

PUNITIVE DAMAGES: Costs. In the absence of actual damages, there can be no award of punitive damages, notwithstanding malice is shown.

REMEDY: *Mandamus and Mandatory Injunction.* Mandamus, and not mandatory injunction, is the proper action to compel a corporation to post its by-laws, as provided by Code of 1873, sections 1076-1077.

RIGHT TO MANDAMUS. A corporation cannot be compelled by mandamus to post its by-laws, as provided by Code, 1873, sections 1076, 1077, unless plaintiff pleads or proves a personal interest entitling him to the writ (sections 3377 and 3378).

TENDER OF INSPECTION: *Damages.* Where plaintiff sought the right to inspect the stock book of a corporation, which, by its answer, tendered him such right, and also tendered all the costs of the suit to date, his failure to dismiss the suit, where no actual damages had resulted, warrants the taxing of costs against him after the tender, though he is entitled to nominal damages.

DENIAL OF FUTURE INSPECTION. In an action for a mandatory injunction to compel a corporation to permit plaintiff to inspect its stock book, where the corporation by its answer tenders such right to him, he cannot claim he is entitled to further relief because of mere suspicion that at some future time the right might be denied him.

Reversal: NOMINAL DAMAGES. A judgment will not be reversed because of failure to allow nominal damages.

Appeal from Marshall District Court.—HON. G. W. BUENHAM, Judge.

SATURDAY, MAY 14, 1898.

SUIT in equity to prevent defendants from secreting their stock book and ledger, and from putting any obstacle in the way of the plaintiff's examining the same, and to compel defendants to deliver said books for inspection; to compel defendants to post up in their place of business the amount of stock paid in, the amount subscribed, the amount of the indebtedness of the corporation, a copy of its by-laws, and the names of its officers; and for damages for the denial of plaintiff's right to inspect the books. In addition to a denial and certain affirmative defenses, which need not be specifically mentioned, the defendants made a tender or offer to confess

in these words: "That without conceding the
1 legal right of the plaintiff to see the books and the statutory posted matter, and without confessing any of the allegations of the petition, but affirming all the allegations in the answer heretofore filed, states that, in view of the fact that all litigation between the parties hereto has been settled, the defendants now here tender to said Boardman the right to examine the copy of the stock book and see the statutory matter posted, all of which is on exhibition at the principal office of the defendants, in Marshalltown, Iowa, and offer to pay all costs of suit up to this time. Wherefore defendants ask to be discharged with their costs." The case was tried to the court, resulting in a decree dismissing the plaintiff's petition, and taxing all the costs made prior to the filing of the offer to confess, to defendants, and all costs made subsequent to that time to the plaintiff. Plaintiff appeals.—*Affirmed.*

C. H. E. Boardman for appellant.

Binford & Snelling for appellees.

DEEMER, C. J.—The pleadings are very voluminous, and but enough of them, in addition to what precedes, need be stated to show the points involved. The Marshalltown Grocery Company, appellee, is a corporation for pecuniary profit, organized under the general incorporation laws, with its principal place of business at Marshalltown. At the time the difficulties which lie at the foundation of this suit arose, it was occupying a building belonging to appellant as a sub-tenant. While
2 some litigation was pending between appellant and this appellee, he (appellee) requested of the officers of the corporation an inspection of its stock book or stock ledger. This request was denied him, because, among other things, it was claimed that the book was in the possession of the then secretary, who was a resident of Oskaloosa. Plaintiff thereupon commenced this suit. Thereafter, and subsequent to the filing of an answer by the defendants, plaintiff procured an attorney at Oskaloosa to make an inspection of these books. This attorney made the necessary examination, and reported the facts to his client. For this work the attorney made a charge, which will be hereafter referred to. The plaintiff thereupon amended his petition, and asked that appellee be required to post a copy of its by-laws, etc., as required by statute. Other pleadings followed which need not be referred to in detail; and on March 9, 1896, nearly two months after the original action was commenced, plaintiff made a written demand upon the corporation for the right to inspect its stock book, and for information as to its by-laws, etc., which demand appellant charges, in an amendment filed March 11, 1896, was not complied with. In this

amendment plaintiff also asked damages for being denied the right of inspection. Various pleadings followed until August 28, 1896, when defendants filed the tender or offer to confess hereinbefore set out. The case was tried as in equity, and, while there were several rulings on motions and demurrers of which appellant complains, yet, as the case is triable *de novo*, they will be disposed of by what is said touching the merits of the case.

The statute (section 1078 of the Code of 1873) seems to give any person desiring it the right to inspect the stock book or ledger of a corporation organized for pecuniary profit. See, also, *Ellsworth v. Dewart*, 95 Iowa, 108. The same Code also provides (section 1076 and 1077) that all such corporations shall keep posted in their principal place of business, and subject to public inspection, a copy of the by-laws, with the names of all of its officers appended thereto, a statement of the amount of capital stock subscribed, of the amount actually paid in, and the amount of the indebtedness in a general way, which statement must be corrected as often as any material changes therein take place in relation to any part of the subject-matter. These last requirements are primarily for the benefit of the public. *Des Moines Nat. Bank v. Warren Co. Bank*, 97 Iowa, 204. They are also for the special benefit of those who desire to deal with the corporation, and have an interest in knowing the truth relating to the matters required to be posted. When either inspection is denied or posting neglected, any one injured thereby may have his action for damages, or performance may be required by appropriate action. Ordinarily, the performance of a duty which the law enjoins upon a corporation is to be compelled by mandamus; but such action, when brought by a private citizen, must be by one who has some personal interest

therein. *Scripture v. Burns*, 59 Iowa, 70; *State v. County of Davis County*, 2 Iowa, 280.

Appellant contends, however, that this is a suit for a mandatory injunction, and that he need not prove nor plead that he has any special interest. It is true that the petition is in this form, and that the specific relief prayed is for a mandatory writ, in so far as the case relates to the inspection of the books; but as to the posting of the by-laws, names of the officers, etc., the action,

although called a suit for an injunction, is clearly
5 one of mandamus. It may well be doubted

whether a court, by process of injunction, can grant such relief as plaintiff asks with reference to the stock books. But, be this as it may, it is clear that as to the posting of by-laws, etc., the action should be by mandamus; and, as appellant has neither pleaded nor proved any such personal interest as entitles him to the writ, his petition, in so far as it relates to the matter of posting, should be dismissed. See Code 1873, sections 3373-3378.

Treating the petition as sufficient for the purpose of enforcing the right of inspection, we find that appellant was in fact given this right by and through his attorney at Oskaloosa, while the books were there, in the hands of the secretary of the corporation, and that, after the books were returned to the principal place of business, appellees, by the pleading of August 28th, tendered to appellant the right to examine a copy of the stock book, and to see the statutory matter posted, all at its principal place of business, and further agreed to

pay all the costs up to that time. This was all
6 appellant was seeking with reference to the
stock book, to-wit, the right to inspect it (or a copy, as the statute provides). He did not ask, nor could he well pray, that the book or a copy thereof be at all times kept open for public inspection. His right was

personal, and to inspect at that particular time, and perhaps at all times in the future when he desired. Given the right to inspect at that particular time, he was afforded all that he desired, and should have accepted the offer, and dismissed his suit, unless he was entitled to the damages he prayed. As to this, more hereafter.

Appellant claims, however, that this was not sufficient; that, while he was given the particular right he then demanded, yet he had no assurance that at some future time the right would not be denied him.

7 It is sufficient to say in answer to this that the burden was upon him to show that some right would probably be denied him in the future. He cannot rest his case upon mere suspicion or surmise. Reasonable certainty of the denial of some right in the future should be shown

before the court will undertake to interpose its remedial arm. The appellant was
8 tendered the inspection he desired, with offer of payment of costs up to that time; and the trial court was clearly right in taxing the costs of suit made after that to appellant, unless it be found that some damages should be awarded because of the denial of his right prior to the filing of the tender or offer to confess, before

referred to. Let us see what these alleged damages are. They are—*First*, the amount paid the
9 Oskaloosa attorney; *second*, value of time lost in attempting to secure plaintiff's rights; and, *third* exemplary damages. Appellant was no doubt entitled to nominal damages by reason of the infraction of a
statutory right, but it is the unvarying rule of

10 this court not to reverse because of failure to allow nominal damages. Moreover, appellees, by their tender, which was evidently held good by the trial judge, confessed, agreed to, and did pay nominal

damages, in paying the costs made up to the time of filing their offer.

As to actual damages, the rule seems to be that it is only in exceptional cases allowance is made a litigant for time or expense incurred in prosecuting or defending an action. Liability for the taxable costs
11 is ordinarily considered sufficient punishment for unfounded claim or mere tricious defense. The items which appellant claims should be allowed him were incurred in the prosecution of his action, and in an attempt to secure to himself the advantage of a statutory right. The denial of this right did not in
12 itself cause damage; at least, none is shown. The expense was incurred in an attempt to secure a right, and we know of no rule which will authorize the allowance of such items as damage in a case brought to secure it. If it be true that they are recoverable, then there is good reason for holding that attorney's fees, value of time lost, expenses in attending court, and kindred matters may be recovered or taxed in any civil action. If anything is well settled, it is that such items can neither be recovered nor taxed. No actual
13 damages resulting from the denial of appellant's statutory right are shown, and, as there were no actual damages, punitive damages cannot be assessed, no matter how malicious the defendants' conduct. We are convinced, however, that there was no malice, and this should end the inquiry.

Appellant was offered all he was entitled to, and the trial court properly dismissed his petition. Appellant has filed a motion to strike appellees' amended abstract from the files. We think, in view of the whole record, that this motion should be sustained, and that the cost of printing the same should not be taxed. This amended abstract was filed out of time, and contains nothing material to the controversy.—AFFIRMED.

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JOHN D. LONSDALE, Administrator, Appellant, v. CARROLL COUNTY.

Taxation. A mistake of the auditor in including in the tax list sent by him to the treasurer land which is not subject to taxation, as a result of which the land is sold, is not within Code, 1873, section 899, providing that when, by mistake or by wrongful act of the "treasurer," land has been sold on which no tax was due, the county shall hold the purchaser harmless by paying him the amount of principal, interest and costs to which he would have been entitled if the land had been rightfully sold, and the "treasurer" and his bondsmen will be liable on his official bond.

SAME. Taxes paid by a purchaser of land at a tax sale after the purchase are not within Code, 1873, section 899, providing that when by mistake or wrongful act of the "treasurer" land has been sold on which no tax was due at the time, the county is to hold the purchaser harmless by paying him the amount of the principal and interest and costs to which he would have been entitled if the land had been rightfully sold.

Limitation of Actions: TAXES. The payment of taxes on land belonging to the government and not subject to taxation, under the belief that the government has parted with its rights to the land, does not prevent the running of the statute of limitations against the right to recover the taxes so paid, under Code, 1873, section 2530, providing that in actions for relief on the ground of "mistake," the cause of action shall not be deemed to have accrued until the mistake has been discovered.

SAME. A mistake inducing the purchase at a tax sale of land on which no taxes are due does not, where such mistake is not a ground for relief of the purchaser, stay the operation of the statute of limitations, under Code, 1873, section 2530, providing that in actions for relief on the ground of mistake, the cause of action shall not be deemed to have accrued until the mistake is discovered.

Appeal from Carroll District Court.—HON. CHARLES D. GOLDSMITH, Judge.

MONDAY, MAY 16, 1898.

THE plaintiff is the administrator of the estate of John Lonsdale, deceased, who died April 26, 1892. In November, 1867, the treasurer of Carroll county offered for sale for taxes the one hundred and sixty acres of land in question, and sold the same to William Bowers, who thereafter paid the taxes on the land for the years 1868 and 1869, and assigned the certificate of purchase to John Lonsdale, who thereafter paid the taxes on the land to and including the year 1878, and on a part of the land for the year 1879. Lonsdale, in October, 1879, sold part of the land to one W. T. Minchen, and in April thereafter sold to him the balance, conveying the same by warranty deed. It is a fact that the land during all those years, and to March, 1892, belonged to the government and was not subject to taxation. In March, 1892, the government sold and conveyed the land to one John P. Minchen. In the purchase of the land by Bowers and by Lonsdale, and in the payment of taxes thereon, they acted under a belief that the land was subject to taxation, and was rightly sold by Carroll county for delinquent taxes due thereon, and the land was conveyed by John Lonsdale to W. T. Minchen under such a belief, and such belief continued to the death of John Lonsdale, and with his administrator, until W. T. Minchen presented a claim against the estate of John Lonsdale, deceased, for damages for a breach of the covenant in his deed of conveyance to W. T. Minchen, on which claim there was allowed one thousand, nine hundred and seventy-three dollars and seventy-three cents. It is also averred that the land was assessed by the officers of Carroll county by mistake, and was, by the treasurer of the county sold by mistake. This action was commenced in July, 1894. These facts appear in the petition on which plaintiff seeks to recover, in behalf of the estate, the amount originally paid for the

tax sale certificate, and taxes subsequently paid by both Bowers and Lonsdale, with interest thereon. To the petition there was a demurrer, which the court sustained, and judgment was entered for defendant, from which the plaintiff appealed.—*Affirmed*.

C. W. Hill and *S. D. Nichols* for appellant.

George W. Korte county attorney, for appellee.

GRANGER, J.—I. It will be seen that the last payment of taxes for which recovery is sought was made in 1880, and this suit was commenced in July, 1894, and the question is presented by the demurrer whether the action is barred by the statute of limitations, more than five years having elapsed after the payment of the last item and the commencement of the suit. It is
1 conceded that the action would be barred except for section 2530 of the Code of 1873, as follows: "In actions for relief on the ground of fraud or mistake, and in action for trespass to property, the cause of action shall not be deemed to have accrued until the fraud, mistake or trespass complained of shall have been discovered by the party aggrieved." It is urged that this action is for relief on the ground of mistake, so that the section has application. The mistake, as claimed, is that the treasurer sold the land for taxes, as land subject to taxation, when it was not. That the land was not subject to taxation was first known in 1892, when the claim was filed against the Lonsdale estate; so that, if the cause of action is not deemed to have accrued until that time, the action is not barred. It may be well to first settle the provisions of the law under which a recovery can be had, if at all. It is without dispute that there is no common-law right of action;

that, if there is a recovery, it must be a statutory right.

Lindsey v. Boone County, 92 Iowa, 86. Appellant asserts his right to recover under sections 870 and 899 of the Code of 1873. Both sections are in the chapter providing for the "collection of taxes," and are as follows, so far as they are important:

"870. The board of supervisors shall direct the treasurer to refund to the tax payer, any tax, or any portion of tax found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon."

"899. When, by mistake or wrongful act of the treasurer, land has been sold on which no tax was due at the time, or wherever land is sold in consequence of error in describing such land in the tax receipt, the county is to hold the purchaser harmless by paying him the amount of principal and interest and costs to which he would have been entitled had the land been rightfully sold, and the treasurer and his bondsmen will be liable to the county to the amount of his official bond; or the purchaser, or his assignee, may recover directly of the treasurer, in an action brought to recover the same in any court having jurisdiction of the amount and judgment shall be against him and his bondsmen; but the treasurer or his bondsmen shall be liable only for his own or his deputies' acts."

The recovery sought in this case is for the purchase money paid at the tax sale, and also for money paid as taxes thereafter. It is plain to be seen that section 899 has no reference to the taxes paid after the purchase. It deals alone with sales of land for taxes. Section 870, on the other hand, deals with "taxes erroneously or illegally exacted or paid." As these are the only sections of the statute on which reliance is or could be placed for a recovery, the conclusion is clear that for the money paid at the tax sale,—or, in other words, for the

purchase money,—if a recovery is had it must be under section 899, while as to the other part of the claim
3 it must be under section 870. Confining ourselves, now, to the claim for the purchase money, it is said by appellee that the mistake is not one of the treasurer, but of the assessor and the auditor, as the tax list comes to the treasurer from the auditor prepared, and the statute does not provide for holding the purchaser harmless because of mistakes of the auditor. Appellant urges that such is a narrow construction, and we might be of that view, but for the latter part of the section. The language of the section is, "When by mistake or wrongful act of the treasurer, land is sold," etc., the purchaser shall be held harmless. It is a statutory rule of construction that one part of a statute should be construed in light of another part, and the rule may be profitably applied here. It will be seen from the latter part of the section that for the mistake of the treasurer he is made liable to the county, and others, on his official bond, as well as his bondsmen; and hence, in contemplation of law, it is a violation of his official duty. The tax list goes to the treasurer with the taxes levied, and section 843 of the Code of 1873 provides that the county auditor shall deliver it to him, and take his receipt therefor. It is then provided in the same section: "And such list shall be full and sufficient authority for the county treasurer to collect taxes therein levied." If appellant's construction is correct, and, by construction, the statute is made to include the mistakes of the auditor, then it follows that the treasurer is made liable on his bond for such mistakes,—a conclusion which we think no one would attempt to maintain. But it is said that, even though the mistake in this case was, in the first instance, that of the auditor it was still the mistake of the treasurer, because the land could not be legally sold for taxes. There is force

in the position to this extent: that the sale was wrongful by whomsoever made, because there was no legal authority for it. But that does not meet the difficulty. We are inquiring after a remedy for a conceded wrong, in the sense of a mistake, and, if the statute under consideration does not mean that the liability of the county is for the mistakes and acts of the treasurer alone, then it means that the county must pay because of the mistakes of the auditor; and, although the treasurer has followed the directions of the law, and collected taxes, as provided by the list, the county may look to his official bond for reimbursement. In reason, there could have been no such legislative purpose. It is thought that *Storm Lake Bank v. Buena Vista County*, 66 Iowa, 128, supports appellant's theory, but it does not deal with the question. In that case the mistake was that of the treasurer. So far as we know, this particular question has never been determined by this court. We might not differ from appellant in the view that there is as much reason for relief when such mistakes are made by the auditor as when made by the treasurer, but we must keep in mind that the purpose of the statute is to create a remedy, rather than take from or abridge a remedy previously existing; and hence that which is not
4 given does not exist. As we hold that the mistake inducing the purchase is not a ground of relief for plaintiff, it did not have the effect to stay the operation of the statute of limitations, so that the action for the purchase money should not be deemed to not have accrued till the mistake was discovered.

II. We now look to the part of the claim for the taxes paid after the purchase. There is no doubt but that these taxes were erroneously and illegally
5 exacted and paid, so that the law gave to plaintiff the right to have them refunded by a timely and proper proceeding. From the last payment of such

taxes to the commencement of this suit was about fourteen years, and we reach the question again if there is such a mistake as will arrest the operation of the statute of limitations until the mistake is discovered. Plaintiff's right, if not lost on this branch of the case, is to have the money refunded if erroneously or illegally exacted or paid, whether by mistake or otherwise, under section 870, before referred to. We do not see how to distinguish this case on principle from *Beecher v. Clay County*, 52 Iowa, 140. That was a case to compel the refunding of taxes illegally collected by virtue of the same statute, and more than five years after payment had elapsed, and the statute of limitations was invoked. It was there claimed, also, that the statute had not run because of section 2530. In that case the illegality of the tax consisted in the absence of a record levy of the taxes, and the court found that the plaintiff had no actual knowledge of the fact. This court held that section 2530 had no application; that it was not an action for relief on the ground of mistake; that the gravamen of the complaint was the payment of illegal taxes; and that the ignorance of the fact that there was no levy was a mere incident, and not the foundation of the cause of action. Why is not this case the same? Here the action is to recover taxes illegally paid. The mistake is as incidental in one case as in the other. In both cases the mistake is as to the facts rendering the taxes illegal. The foundation of both actions is the payment of illegal taxes. We regard the cases, on principle, as without distinction. As an original proposition, the writer of this opinion would not concur in the rule of the *Clay County Case*. I think the spirit and meaning of section 2530 is best subserved by holding that when a mistake induces the act which is the foundation of the action, the mistake is the ground of relief within the

meaning of the section; otherwise it is difficult to understand how a mistake could ever be a ground of relief. *Storm Lake Bank v. Buena Vista County* is in no sense against our conclusion. That was a case under section 899 to recover purchase money at a tax sale, and the mistake was that of the treasurer. It refers to and distinguishes the *Clay County Case*. It seems to us that on the face of the petition the cause of action is barred by the statute of limitations, and the judgment will stand **AFFIRMED**.

JOHN H. McDONNELL, Administrator of the Estate of
HENRY M. McDONNELL, Deceased, Appellant, v.
THE ILLINOIS CENTRAL RAILWAY COMPANY.

Master and Servant: NEGLIGENCE. A railroad company is not guilty of negligence in failing to erect any barriers around the pits used
2 by its employes in its round-house, where it would be impossible to erect barriers and do the work about an engine which is intended to be done when the pits are used.

CONTRIBUTORY NEGLIGENCE. Plaintiff's intestate, whose occupation
1 was that of working in the round-house of a railroad, was sent at night to another round-house, where he was killed by falling into
3 an unguarded pit, in which he had previously worked. It appeared that all round-houses had such pits, which was known to the intestate, and that intestate had an unlighted torch with him.
Held, to show contributory negligence.

Appeal from Linn District Court.—HON. W. G. THOMPSON, Judge.

MONDAY, MAY 16, 1898.

ACTION at law to recover damages for the death of plaintiff's intestate, due, as is alleged, to the failure of defendant to properly or sufficiently light its round-house, to negligence in the construction of the house, in that the pits therein were placed in too close proximity to the door; and to failure to properly guard and protect the pit. The defendant filed a general denial, and

pleaded contributory negligence. The case was tried to a jury, resulting in a verdict and judgment for defendant, and plaintiff appeals.—*Affirmed.*

J. H. Crosby and Rickel & Crocker for appellant.

Rothrock & Grimm and W. J. Knight for appellee.

DEEMER, C. J.—On and prior to the ninth day of January, 1894, Henry M. McDonnell, deceased, was in the employ of the Burlington, Cedar Rapids & Northern Railway Company, at work in its roundhouse in the city of Cedar Rapids. By an arrangement not
1 necessary to be more specifically stated, men in the employ of this company were subject to the call of the Illinois Central Railroad Company for work in its roundhouse. On the night in question, McDonnell and one Drahos were sent by the foreman of the “Burlington” roundhouse to the roundhouse of the Illinois Central Railroad Company, to do some work upon some of the engines of the latter company. The night was cold and windy. McDonnell started to obey his orders, with a box of tools upon his back and a torch in his hand. He arrived at the “Illinois Central” roundhouse about 11:30 p. m. The wind had blown out his torch. He entered defendant’s roundhouse at the southeast door, and there met the foreman of the “Burlington” house. The “Burlington” foreman had a lantern in his hand, and was standing about midway between this door and the east rail of the eastern track which entered the house. McDonnell inquired for Drahos, who was to assist him in his work; and the foreman directed him to a place near the extreme north end of the house where a man was at work with a torch for his light. McDonnell started in the direction of this light, going diagonally across the house, in a northwesterly direction, and had proceeded but a short distance when he fell into one of the pits which are found

in all roundhouses, in order to enable employes to get under and repair engines. From the injuries so received, McDonnell died; and this action is brought by his administrator to recover the damages done his estate. The grounds of negligence alleged have already been referred to, and need not be repeated.

The evidence shows that the roundhouse had three stalls. The south end of the pits built in these stalls was ten feet from the south doors of the house, and the southeast corner of the east pit was about six feet from the door at which the deceased entered. The pit was about four feet wide, and a trifle over three feet deep, and extended north between the two rails of the east track for nearly fifty feet. The house itself was about seventy feet long. It was eighty-two feet wide at the north end, while at the south end it was forty feet. About midway of the house from the north to south, and a few feet east of the center, was a post, upon which hung a large lamp facing north; and against this post was a bench, upon which was an ordinary railway lantern. The "Burlington" foreman had a lantern. McDonnell had a torch which was not lighted, and his associate with whom he was to work was at the north end of the building, with a lighted torch. The pits were not guarded or barricaded in any manner, but, in their construction and use, were like pits in all other roundhouses, unless it be that they were nearer the entrance to the house than in some others. There is a dispute as to whether the lamp upon the post was burning at the time of the accident, and also some question as to whether the lantern upon the bench was lighted; and it may have been, and doubtless was, a question for the jury to determine whether the house was sufficiently lighted. One of the instructions complained of, relates to the duty of the defendant's servants in the lighting of the house. In our view of the case, it is not necessary to consider this question.

The evidence clearly shows that it would be impossible to erect any barriers around the pits and do the work about an engine which is intended when the pits are used; so that no negligence can be predicated upon this omission.

The alleged negligent construction of the round-house was properly submitted to the jury, and no fault is found with the instructions relating to this matter.

3 That all roundhouses have these pits seems to be conceded, and the evidence conclusively shows that McDonnell knew that this one had them, for he had worked in the very pit into which he fell prior to the time he received his injuries. Having this knowledge he walked blindly into the pit. Surely, this was contributory negligence. If the lantern his foreman had gave sufficient light to indicate the position of the pit, and the deceased failed to look and discover it, he was clearly negligent. If, on the other hand this lantern did not disclose the position of the pit, and it was so dark that the deceased could not see where he was going, then he was guilty of such negligence that he ought not to recover. He knew the pit was close at hand, or, if he had thought, must have known, for he had been in this roundhouse twice before, and, as a round-house employe, knew that such pits are present in all such houses. And yet, according to appellant's theory, although he walked blindly into this pit he may still recover. We do not think this is so, and, in our opinion, it is difficult to conceive of a plainer case of contributory negligence. The trial court instructed the jury, in effect, that if, when the deceased undertook to walk across the engine house, it was so dark that he could not see where he was walking, and if he had a torch with him which he could have lit, and which, when lighted, would have afforded him light enough to have seen the pit, and instead of lighting the torch he continued to

walk in the dark, and while so doing stepped into the pit, then plaintiff could not recover. As applied to the facts of this case, showing knowledge of the deceased as to the presence of such pits in roundhouses in general, and in this house in particular, we think the instruction was correct, and that the jury very properly found for the defendant.

Some other errors relating to the admission and rejection of evidence, and to the instructions given by the court, are complained of; but, as none of them go to the question of contributory negligence, they need not be considered. There is no prejudicial error, and the judgment is **AFFIRMED**.

THE FIRST NATIONAL BANK OF CONNEAUTSVILLE, PENNSYLVANIA, Appellant, v. PERRY ROBINSON, Administrator, Appellee.

105	408
115	875

Sale: WARRANTY. A representation on the sale of a stallion that if it is kept in healthy and proper breeding condition by careful and judicious handling, and does not prove to get a reasonable number
 4 of mares bred to him in foal, the purchaser may return him in good health and condition and get instead another horse of equal value, is, in legal effect, a warranty of average breeding qualities.

General Agent: POWERS: Presumptions A purchaser of a stallion from the owner's general agent, who had authority to warrant
 3 that the horse was of average breeding qualities, has, in the
 4 absence of any information to the contrary, the right to assume that he has the authority to warrant the horse to be a "sure foal getter"

SAME. One authorized to sell several horses to any one whom he can
 3-4 induce to purchase is a general agent.

Appeal. Where it is not shown that appellant's abstract contains all
 1 the evidence, the judgment may be affirmed, but the appeal cannot be dismissed.

SAME. Where appellant's abstract does not contain all the evidence,
 1 and appellee files an abstract setting out evidence which it claimed was omitted by appellant, and does not deny that both abstracts contain all the evidence, the court will presume that all the evidence is before it.

BILL OF EXCEPTIONS. A bill of exceptions stated that on the trial the court gave to the jury "instructions numbered one to — inclusive," which were all the instructions given in the cause, and that 2 to the giving of each of which, "except Nos. one to the last one given." plaintiff duly excepted to at the time, will not be held insufficient on the ground that it appears therefrom that none of the instructions were excepted to, as it is obvious that the word "except" was erroneously inserted.

Appeal from Monroe District Court.—HON. T. M. FEE,
Judge.

MONDAY, MAY 16, 1898.

ON January 23, 1895, the plaintiff bank filed a claim against the estate of D. C. Robinson, deceased, of which the defendant is administrator, for the sum of eight hundred and twenty-one dollars and thirty-three cents, with interest thereon at eight per cent. after June 2, 1890. This claim was based upon a promissory note executed by said intestate to the firm of Powell Bros., and duly assigned to plaintiff. The administrator refused to allow it. The issue was tried to a jury. There was a verdict and a judgment for defendant, and plaintiff appeals.—*Affirmed.*

Mabry & Payne for appellant.

T. B. Perry and *W. A. Nichol* for appellee.

WATERMAN, J.—It appears that the firm of Powell Bros., of Springboro, Pa., were dealers in horses, and that in the spring of 1888, through one Jacob Knapp, of Centerville, Iowa, who was then their agent, they sold to defendant's intestate, D. C. Robinson, a stallion, for breeding purposes, and the note in question was given as a part consideration therefor. It is claimed by defendant that Knapp warranted the stallion to be a "sure foal getter," and that there was a breach of this

warranty, in that the horse was practically worthless for breeding purposes. On the other hand, it is contended that Knapp had no authority to make any such warranty. The note sued upon is not negotiable; so the defense, if established, is good as against plaintiff.

II. Defendant moves to dismiss the appeal because it is not shown that appellant's abstract contains all the evidence. If the motion was well grounded, we should be justified in affirming the judgment
1 below, but not in dismissing the appeal. *Maloney v. Railway Co.*, 95 Iowa, 255; *Clark v. Tracy*, 98 Iowa, 649. But it does not appear that the motion is well taken. Neither in the abstract or the amendment thereto filed by appellant does it appear that all of the evidence is presented here; but appellee has filed an abstract setting out considerable evidence which it is claimed was omitted by appellant, and he does not deny that the abstracts of both parties contain all the evidence. With the record in this condition, we are authorized to presume that we have all of the evidence before us. *Van Sandt v. Cramer*, 60 Iowa, 424; *Starr v. City of Burlington*, 45 Iowa, 87; *Balm v. Nunn*, 63 Iowa, 641.

III. It is urged by appellee that the instructions of the trial court cannot be considered here, because appellant has not properly taken or preserved its excep-
2 tions thereto. A bill of exceptions was duly signed and filed, containing this clause: "That on the trial of this cause the court gave to the jury instructions numbered one to —, inclusive, which were all the instructions given to the jury in the cause, and to the giving of each of which, *except* Nos. one to the last one given, the plaintiff duly excepted at the time. Said instructions are entitled in the cause, filed therein —, 1895, and marked 'Exhibit B' to this bill of exceptions No. one." It is said that the language here used shows that none of the instructions were excepted

to at the time they were given. We think that this is too technical. We ought not to confine ourselves to the literal reading of this paragraph, but should accept the obvious and apparent intent disclosed. The word "except," which we have italicized is erroneously inserted. This is so manifest that we think no one could be misled by it. We may add here that the exceptions are sufficiently specific. *Hawes v. Railway Co.*, 64 Iowa, 315; *Mann v. Railway Co.*, 46 Iowa, 637.

IV. Plaintiff makes no complaint of the jury's finding that Knapp made the warranty claimed, and that it was broken. The sole question presented for our consideration, as stated by appellant's counsel, is, "Has an agent of a horse dealer, with authority to sell a breeding stallion, implied authority to warrant that said stallion is a sure foal getter?" We think, instead of considering this abstract question, we will do better to confine ourselves to the facts of this particular case; and we will narrow the field of inquiry somewhat by stating the matter for determination in this way: Had Knapp, under the conceded or undisputed facts of the case, authority to make such warranty? The trial court instructed the jury, in effect, that

Knapp's authority to make the warranty was to be presumed, in favor of the purchaser, unless it was shown that the purchaser knew that he possessed no such authority. This thought was repeated in different forms in several of the instructions. It was established by evidence introduced by plaintiff that Knapp took from Powell Bros., to sell for them, five stallions, including the one sold to defendant's intestate. He was not confined to the transaction with Robinson, or to dealing with any particular person, but was authorized to sell to any one whom he could induce to purchase. Knapp

was therefore a general agent for Powell Bros. 1 Parsons, Contracts, 39. It is also in evidence on the
 4 part of plaintiff that Knapp had authority to represent to purchasers "that if the said stallion, by careful and judicious handling, and kept in healthy and proper breeding condition, should prove not to get a reasonable number of mares bred to him in foal in neither of the first two season's trial [the purchaser] may return him to us [Powell Bros.], at Shadeland, Crawford Co., Pa., in good health and condition, and get, instead, another horse of equal value." This, in legal effect was a warranty of average breeding qualities. We have here, then, a general agent with authority to warrant, to some extent, the horse he sells. This court has held that one purchasing from a general agent, clothed with authority to warrant the article he sells, if in ignorance of any restriction upon his power, may lawfully presume that such agent has authority to make the warranty he offers. *Murray v. Brooks*, 41 Iowa, 45. In other words, under the undisputed facts in the case, Robinson had a right to assume, in the absence of information to the contrary, that Knapp possessed authority to warrant this horse to be a sure foal getter; and this being true, the exceptions to the instructions must be overruled, and the judgment below AFFIRMED.

JAMES SCOTT, Proponent, v. SARAH J. HAWK, JOHN H. SCOTT AND FREEMAN SCOTT, Contestants, Appellants.

Evidence: SIGNATURE TO WILL. Evidence by an attorney who had
 1 charge of the papers of a deceased testator that at the latter's
 2 request he showed him a will, and that testator, after looking it over carefully and examining the signatures, pronounced it his will, is competent and relevant on a contest of the will, where the subscribing witnesses are dead.

EXECUTION OF WILLS. On a contest of a will, evidence that the
 1 decedent, on being shown the instrument propounded as his will,

105 467
 107 724
 106 467
 131 303

2 and after examination of the signatures thereto declared it to be his will, is convincing evidence of its execution by him.

Pleading: PETITION FOR NEW TRIAL: *Demurrer*. A petition for a new trial on the ground of newly discovered evidence is not
1 demurrable because it contains merely a general averment of diligent search and inquiry, and inability to obtain the evidence set out, where the specific acts done are not called for.

TRIAL OF ISSUE. Issues presented in a petition for new trial are triable as in ordinary actions

GRANTING—DISCRETIONARY. The granting of a new trial is in the
8 sound discretion of the lower court.

Appeal from Keokuk District Court.—HON. A. R. DEWEY,
Judge.

MONDAY, MAY 16, 1898.

TRIAL to jury, verdict and judgment for contestants. A petition for a new trial, filed by proponent, was granted, and contestants appeal—*Affirmed*.

C. M. Brown and *D. D. Hill* for appellants.

Hamilton & Donohue, Woodin & Son and *C. H. Mackey* for appellee.

LADD, J.—A paper purporting to be the will of John Scott, deceased, left two-thirds of his estate to the proponent, a grandson, and one-third to his wife, who died before he did. Objections to its admission to probate were made by Sarah Hawk, a daughter, and John H. and Freeman Scott, grandsons. At the trial, when the proponent had concluded the introduction of his evidence, the court directed the jury to return a verdict for the contestant because the execution of the will had not been proven. The will appeared to be signed by Scott by making his mark, though this was not stated in the attestation of the subscribing witnesses. These were dead, and the genuineness of their signatures was

shown, but not that of the mark of deceased. On the twenty-seventh day of March, 1896, the proponent filed a petition for a new trial, in which it is alleged that C. H. Mohland, of Burlington, Iowa, when a resident of Sigourney, was a partner of D. W. Hamilton, and engaged in the practice of law; that the firm of Mohland & Hamilton had charge of notes and other papers of deceased, including an envelope containing this will; that at request of deceased he showed him the will, and deceased, after looking it over carefully, and examining the signatures, pronounced it to be his will; that proponent did not know said Mohland had such knowledge until after the trial; that he is a resident of Kansas, and did not know till after the beginning of the term that objections had been filed, when he came to Sigourney, and made diligent search and inquiry for information connected with the execution of the will, but was unable to obtain any of the nature of that set out. The contestants demurred to the petition because it showed on its face (1) that due diligence was not exercised, and (2) the evidence of Mohland to be incompetent and irrelevant. This demurrer was overruled.

I. Reasonable diligence must be alleged and proven in order to obtain a new trial on petition. Code, section 4092; *Miller v. Albaugh*, 24 Iowa, 128; *Stuckslager v. McKee*, 40 Iowa, 212; *Stineman v. Beath*, 36 Iowa, 73; *Carson v. Cross*, 14 Iowa, 463; *Darrance v. Preston*, 18 Iowa, 396; *Cohal v. Allen*, 37 Iowa, 449; *Woodman v. Dutton*, 49 Iowa, 398. Affidavits in support of a motion for a new trial on the ground of newly-discovered evidence must state the facts constituting reasonable diligence. *Carson v. Cross*, *supra*; *Darrance v. Preston*, *supra*. In the latter case it is said of a general allegation of due diligence: "This averment would

be held insufficient on motion for more specific statement, and possibly as bad on demurrer." In *Cohal v. Allen, supra*, the petition was adjudged insufficient on demurrer, and this language employed: "It fails to show facts constituting diligence in efforts to procure the evidence at the trial. The statements on this point are simply averments of inability to produce and efforts to obtain evidence generally, without sufficiently stating what was done, which is claimed to be proper diligence." From this it would seem the facts alleged were relied on, rather than the general allegation of reasonable diligence. If so, then the ruling is not at variance with that of *Woodman v. Dutton*, 49 Iowa, 398. In that case a demurrer to the petition alleging that with reasonable diligence the evidence could not have been discovered, was sustained. This court, in making the ruling said: "In affidavits in support of a motion for a new trial these [the facts] should be set out, because the affidavits supply the evidence upon which the court acts. But a petition for a new trial, which must be supported by evidence in the ordinary way, is not vulnerable to a demurrer which alleges, in the language of the statute, that the grounds for new trial could not, with reasonable diligence, have been discovered before." This must be regarded as decisive. The rule is somewhat analogous with that holding a general averment negating contributory negligence sufficient in actions sounding in tort. Here, however, an affirmative showing is required, and a petitioner may well be ordered, on motion for more specific statement, to set out the facts upon which he relies. The contestant demurred without calling for what was done amounting to reasonable diligence, and the general averment was rightly adjudged sufficient when so attacked.

II. The evidence of Mohland was both competent and relevant. The subscribing witnesses were dead,

and other evidence of the execution of the will was admissible. *Allison v. Allison*, 104 Iowa, 130.

2 That the deceased, upon the examination of the instrument and the signatures thereto declared it his will, is convincing evidence of its execution by him.

III We shall not review the evidence. The issues were triable as in ordinary actions. *Carpenter v. Brown*, 50 Iowa, 451; *Kruidenier v. Shields*, 77 Iowa, 504; *Mortell v. Friel*, 85 Iowa, 739; *Markley v. Owen*,

3 102 Iowa, 492. The decision was one peculiarly within the discretion of the trial court. *Lundon v. Waddick*, 98 Iowa, 478. The order granting a new trial has ample support in the evidence. Our conclusion renders it unnecessary to consider the motion to dismiss.—AFFIRMED.

H. M. FUNSON, Appellant, v. J. H. BRADT, et al.

Tax Sale: NOTICE TO REDEEM. Code, 1873, section 894, provides that a notice that a sale of land for taxes has been made, and that, unless redemption is made within a certain time, a deed will be made, shall be published as in case of nonresidents, and that "service
1 shall be deemed completed when an affidavit of the service of such notice, and of the particular mode thereof, duly signed and veri-
2 fied by the holder of the certificate of purchase, his agent or attorney, shall be filed with the treasurer authorized to execute the tax deed. *Held*, that where an affidavit of service, made by the attorney of the purchaser, duly filed, made the affidavit of the newspaper publishers, which alleged facts required for a valid publication, a part thereof and showed that the publication was duly made, it was sufficient.

SAME. A description in the notice required by Code, 1873, section 894, of the expiration of the time for redemption of land sold for taxes
5 stated the "west $\frac{1}{4}$ of the southwest $\frac{1}{4}$ of section 1" etc., had been sold instead of an undivided one-half of the land. *Held*, that though the description was not entirely accurate, yet, as it described accurately the entire tract for the taxes on which an undivided half had been sold, it was sufficient.

PRESUMPTIONS. It will be presumed in favor of a tax deed, where it does not appear that notice of the expiration of redemption was

4 served on the person in possession of the land, that no such service was required, in the absence of anything to show that any persons were in possession.

AFFIDAVITS. An affidavit of service of notice of the expiration of the time to redeem from a tax sale signed by the sheriff is insufficient under the statute where it does not show that the sheriff was the agent or the attorney of the purchaser.

SAME. An affidavit of the attorney of the purchaser of land at a tax sale stating that notice of expiration of the time of redemption was served by the sheriff on specified persons and that such persons were the parties in possession of the land described in the notice, is insufficient under the statute, as it does not show that the attorney served the notice.

Cotenancy: TAXATION. One tenant in common cannot against his cotenant acquire a valid tax title to the land owned in common.

Appeal from Calhoun District Court.—HON. S. M. ELWOOD, Judge.

MONDAY, MAY 16, 1898.

ACTION in equity to have set aside certain tax deeds, and for permission to redeem from certain tax sales. There was a hearing on the merits, and a decree, which was afterwards modified. The plaintiff and the defendant J. H. Bradt appeal, the appeal of the plaintiff having been first perfected.—*Affirmed.*

H. E. Long for appellant.

Stevenson & Lavender for appellee, Bradt.

ROBINSON, J.—The land in controversy is the west one-half of the southeast one-fourth of section 1, township 88 north, of range 34, west, in Calhoun county. It was patented to James Burns by the United States in the year 1858. The plaintiff claims title by virtue of the swamp-land grant, a conveyance by Calhoun county to the trustee of the American Emigrant Company, a conveyance from the surviving trustee to the company, and

conveyances from the company and its grantees, and by virtue of a decree of the district court of Calhoun county in favor of certain grantees in the plaintiff's chain of title purporting to quiet that title as against the heirs of James Burns, deceased; also by virtue of a tax deed issued and recorded on the fourteenth day of January, 1893, in favor of W. H. McCracken, for an undivided one-sixteenth of the land in question; a second tax deed, issued and recorded on the twenty-fourth day of April, 1895, in favor of W. H. McCracken for the undivided one-tenth of the undivided fifteen-sixteenths of the south half of the land in question; and a conveyance from McCracken. It may be conceded that the plaintiff is the owner of the land unless the claim of title made by Bradt is well founded. That claim is based upon a tax deed for an undivided one-half of the land issued on the seventh day of February, 1893, to A. N. Jack, and recorded on the next day, and a conveyance from Jack to Bradt; and also upon a tax sale of the undivided one-fourth of the undivided fifteen-sixteenths of the north half of the land, made on the seventh day of December, 1891, to Bradt, the service of a notice of the issuing of a tax deed, and the failure of the landowner to redeem from the sale within the time prescribed by law, in consequence of which it is alleged Bradt is entitled to a tax deed. The tax sales through which Bradt claims are admitted to be regular, and it is from them that the plaintiff demands the right to redeem. On the twenty-fifth day of March, 1896, the district court entered a decree quieting the title of Bradt under the tax deed of February, 1893, to the undivided one-half of the land claimed by the plaintiff, as against him and Bradt's co-defendant, Schwingle, and permitting the plaintiff to redeem from the tax sale of December, 1891, and, upon the making of such redemption, quieting his title to an undivided one-fourth of the undivided fifteen-sixteenths

of the north half of the land claimed by the plaintiff. The amount required to redeem from the sale last mentioned was fixed at ninety-seven dollars and ninety-five cents. On the fourth day of May, 1896, on the motion of the plaintiff, the district court modified the decree by reducing the amount required to redeem to the sum of fifty-three dollars and ninety-seven cents. The plaintiff appealed from the decree as first rendered and as modified, and Bradt appealed from a ruling of the court, which sustained a motion to strike a division of his answer, and from the modified decree so far as it is adverse to him. Schwingle does not appear to be concerned in either appeal.

I. The appellant assails the tax deed of February, 1893, on the ground that due notice of the expiration of the time in which redemption could be made from the sale on which it was based was not given and proved.

Section 894 of the Code of 1873, provided that:

1 "After the expiration of two years and nine months after the date of sale of the land for taxes, the lawful holder of the certificate of purchase may cause to be served upon the person in possession of such land or town lot, and also upon the person in whose name the same is taxed, if such person resides in the county where the land is situated, in the manner provided by law for the service of original notices, a notice signed by him, his agent, or attorney, stating the date of sale, the description of the land or town lot sold, the name of the purchaser, and that the right of redemption will expire and a deed for said land be made, unless redemption from such sale be made within ninety days from the completed service thereof. Service may be made upon non-residents of the county by publishing the same three times in some newspaper printed in said county.
* * * Service shall be deemed complete when an affidavit of the service of said notice, and of the particular mode thereof, duly signed and verified by the holder

of the certificate of purchase, his agent or attorney, shall have been filed with the treasurer authorized to execute the tax deed. * * * And until ninety days after the service of said notice, the right of redemption from such sale shall not expire. * * *” In July, 1892, Jack caused to be served the notice required by statute. The appellant claims that service was not made on James Burns, in whose name the land was then taxed, and that it was, therefore, fatally defective. It is said that Burns was dead when the notice was served, and, as it could not be served on him, proof of service of it was not required. The case, in this respect, seems to be somewhat like that of *Kessey v. Connell*, 68 Iowa, 430, but, whether service of notice as to Burns could have been dispensed with we do not need to

2 inquire. An affidavit of service made by an attorney of Jack, and duly filed, makes the affidavit of the publishers of the newspaper which alleged facts required for a valid publication a part of the affidavit of the attorney, and shows further that publication was duly made. We have held that the affidavit of a proprietor of the newspaper, not being the holder of the certificate, his agent or attorney, is not competent to prove publication. *Association v. Smith*, 59 Iowa, 704; *Ellsworth v. Cordrey*, 63 Iowa, 675; *Sweeley v. Van Steenburg*, 69 Iowa, 696. But we have also held that if the affidavit of the agent makes the statement of the affidavit of the publisher as to the publication of the notices a part of the agent's affidavit, the proof of the publication is sufficient. *Stull v. Moore*, 70 Iowa, 149; *Smith v. Heath*, 80 Iowa, 231. Under the authority of the cases cited, the proof of service as to Burns was all that the statute required.

II. The appellant contends that there was no sufficient proof of service of the notice on Clark Howard, Call Howard, and William Howard, who are claimed to

have been in possession of the land when the notice was served, and therefore entitled to notice. The

3 tax deed recites that it appeared from the affidavit of the attorney for Jack filed in the treasurer's office that due notice of the expiration of the time for redemption had been given to the three persons named, and the notice was addressed to them, but did not state that they were in possession of the land. An affidavit signed "J. M. Stewart, Sheriff," verified, and attached to the notice, stated that it had been served on the three Howards, "the parties in possession of the above-described land"; but the affidavit did not show that Stewart was the agent or attorney of Jack, and was not, therefore, competent evidence of the facts recited. *Ellsworth v. Van Ort*, 67 Iowa, 222; *Stevens v. Murphy*, 91 Iowa, 356. The affidavit of the attorney of Jack, filed as proof of service of notice, states that the notice was served by Stewart on Clark Howard and Call Howard, and that they were "residents of Calhoun county, Iowa, and the parties in possession of the land in said notice described." But the affidavit did not show that the attorney served the notice, nor is there other proof that such was the fact; therefore, under the rule of *Ellsworth v. Van Ort*, *supra*, he was not the proper person to make proof of service as to the Howards, and the statement of the affidavit as to them was without

4 effect. If, however, it be conceded that he was authorized to make the proof, then his affidavit showed due services on the two Howards, who are stated in his affidavit to have been in possession of the land. Our attention has not been called to anything in the record, excepting that to which we have referred, which tends to show that any one was in possession of the land when the notice was required to be given; and we must presume in favor of the deed, if service of notice

on the persons in possession has not been shown, that such service was not required.

III. It is said that the tax deed is void for the reason that the notice of the expiration of the time of redemption stated that the "west half of the south-east quarter of section 1," etc., had been sold, instead of an undivided one-half of that land; and the cases of *Griffith v. Utley*, 76 Iowa, 292; *Roberts v. Deeds*, 57 Iowa, 320; *Poindexter v. Doolittle*, 54 Iowa, 52; *Martin v. Cole*, 38 Iowa, 141,—are cited to support the claim thus made, but an examination of those cases shows that none of them are in point. The notice described accurately the entire tract for the taxes on which an undivided half had been sold. Although the description was not entirely accurate, yet it could not have failed to call the attention of the person upon whom it was served to the sale intended, and the property sold, and thus accomplish the purpose of the statute; and we therefore conclude that it was sufficient. See *Rowland v. Brown*, 75 Iowa, 679. Objection is made to the form of the description of the premises sold, contained in the tax deed, but, we think, without sufficient reason. The tax deed is not shown to be invalid, and Bradt is entitled to the interest which it purports to convey.

IV. The first objection made to the notice of the expiration of the time of redemption from the tax sale of December, 1891, is that when it was served the land was taxed in the name of "Jas. Bums," but that the notice was directed to James Burns. We have examined the original tax list, and have no doubt that the name therein written was "Burns," and not "Bums." But a fatal objection to the title attempted to be acquired by that sale is the fact that, as the tax deed under which

Bradt claims was valid, he became by virtue of that, and of the conveyance to him from Jack, a tenant in common with McCracken before he became entitled to a tax deed under the sale of December, 1891, and is now a tenant in common of the plaintiff; and it is well settled that a tenant in common can not acquire a valid tax title to property owned in common, as against his co-tenant. *Clark v. Brown*, 70 Iowa, 139, and cases therein cited; *Smith v. Smith*, 68 Iowa, 608; *Shell v. Walker*, 54 Iowa, 386. This is admitted by the appellee.

V. The division of Bradt's answer which was stricken out alleged that he was a good-faith purchaser from Jack, without knowledge of any defects in the tax deed. In view of the conclusion we reach that the tax deed was valid, it becomes unnecessary to determine whether the motion to strike was properly sustained. The decree of the district court appears to be right, and it is, on both appeals, **AFFIRMED**.

FRANK HUGO SALVADOR V. M. FEELEY AND MRS. M. FEELEY, Appellants.

Contracts for Services: MEMBERS OF FAMILY. Where plaintiff went to live with defendants when a child and continued to live with them as one of their family after becoming of age, the presumption is that his services were gratuitous, and to recover he must overcome this presumption by showing either an express promise to pay for the services, or that services were rendered and received with the expectation of being paid for.

RULE APPLIED. Plaintiff was brought up by defendants as a member of their family. Defendants told him that they did not expect him to do work for nothing; that he would be paid for all he did; and that on coming of age he would be given a piece of land. At another time they promised him a team and harness when he attained his majority. *Held*, that this did not show an express promise to pay for the service before plaintiff attained his majority, but tended to rebut the presumption that the services were gratuitous.

Limitation of Actions: RUNNING OF STATUTE. An agreement made
5 after a person attained his majority, as to his compensation for
7 future services, interrupts the continuity of the services rendered
8 by him before his majority. without any express agreement, and
an action to recover therefor is barred if not commenced within
five years after the agreement.

Appeal: ASSIGNMENT OF ERRORS: *Amendment.* An amended abstract
presenting additional assignments of error will be considered
though filed without leave of the court after appellant had filed
his argument, but served though not filed more than ten days before
the trial term, where the appellee did not move to strike the amend-
3 ment but after insisting that appellant had no right to file the
same proceeds to present his argument upon such amended assign-
ments. and it is apparent that the submission of the appeal has
not been delayed and that the appellee has not been in any man-
ner prejudiced by the filing of the amendment.

MUST ASSIGN REASON. Under Code, 1873, section 3207, and supreme
court rules, section 36, requiring assignments of error to point out
2 the errors objected to, an assignment which does not give any
reason why the ruling complained of is erroneous is insufficient.

REVIEW: *Conflicting evidence.* When the evidence as to duress is
5-6 conflicting, the question is for the jury.

Appeal from Pottawattamie District Court.—HON. A. B.
THORNELL, Judge.

MONDAY, MAY 16, 1898.

THE following statement of the issues made by
appellants' counsel is conceded to be substantially cor-
rect: "Plaintiff originally, on July 10, 1895, filed a peti-
tion in three counts, but before trial he dismissed count
2, and on the trial, after resting, dismissed count 3
thereof, so that the issues are contained in count 1 of
plaintiff's petition, the answer of defendants, and
1 the reply of plaintiff. Plaintiff alleges that he
has worked for defendants as a farm boy and
hand, from March 1, 1884, to March 15, 1895, under an
implied contract that he should be paid therefor, and
that the reasonable value of such services was nineteen
dollars and seventy cents per month. The defendants
deny that plaintiff ever rendered them any services

by virtue of an implied contract, but state that when plaintiff was a boy about ten years old, homeless and without means of support, they took him to their home, fed and clothed him, sent him to school, and cared for him as they would for a son, and that they agreed with him, when he was about fifteen years of age, that he should work for them until he was twenty-one years of age, in consideration of the support already given him and his board and clothes until he should become of age, and that they did clothe and support him until he came of age. Defendants further claim that the services alleged to have been rendered in count 1 of plaintiff's petitions were personal services rendered from month to month or year to year, and that any cause of action for such services rendered prior to July 10, 1890, is barred by the statute of limitations, five years having elapsed since said services were rendered. Defendants further claim that after plaintiff came of age they made a new agreement with him that he should live with them as long as he might desire, and should receive as compensation for his services one hundred dollars per year and his board and clothes, and that they, in 1895, paid him three hundred dollars thereunder. They also state that on January 19, 1895, they had a full settlement with plaintiff of all differences and accounts up to the date, in writing, under which it was agreed that defendants should execute to plaintiff a bill of sale of a team of horses and permit him to cultivate a tract of land during the year 1895; and they, under this agreement, gave him a team of horses worth two hundred and fifty dollars, and the use of seventy acres of land during 1895, the rental of which was worth two hundred and ten dollars. Defendants make a counterclaim against plaintiff for these sums and some other items, the total amounting to eight hundred and twenty-five dollars. Plaintiff, by way of reply, admits that he signed said

written agreement of settlement, but claims that the same was without consideration, and was secured through duress, on account of threats by defendants of criminal prosecution for the burning of some hay belonging to them. There was no evidence on the trial showing want of consideration for said written settlement, and the court so instructed the jury." Verdict and judgment were rendered in favor of the plaintiff for eight hundred dollars. Defendants appeal.—*Reversed.*

C. G. Saunders and David E. Stuart for appellants.

H. L. Robertson and E. E. Aylesworth for appellee.

GIVEN, J. —I. Appellee questions the sufficiency of the assignments of error as made in the original abstract and the right of appellants to file their additional assignments when they did. Not one of the six
2 assignments of error made in the original abstract "points out the very error objected to," as required by section 3207 of the Code of 1873, section 4136 of the Code, and section 36 of the rules of the supreme court. No reason is given in either assignment why the ruling complained of is claimed to be erroneous. They are general, as that the court erred in giving instructions 1 to 9½, and in refusing to give the instructions asked. Clearly, these assignment are insufficient.

On January 5, 1898, more than ten days before the first day of the trial term, appellant served upon appellee an "additional and amended abstract," setting forth three additional assignments of error, which are
3 sufficiently specific. This additional and amended abstract was filed without leave of court on January 10, 1898, less than ten days before the first day of the trial term, and after appellee's argument had been served and filed. Appellee, in an additional argument,

insists that appellant had no right to file said additional assignments of error after he had filed his argument, without first obtaining leave from the court, and cites *Betts v. City of Glenwood*, 52 Iowa, 124. In that case appellee's motion to strike the amendment to the assignment of errors upon grounds similar to those urged in this case was submitted with the case and sustained. The right to amend on leave granted is recognized, and it is said: "In such a case, the appellee would be entitled to time to present argument thereon." Appellee in this case did not move to strike the amendment to the assignment of errors, but, after insisting that appellant had no right to file the same, proceeds to present his argument upon said amended assignments. In *Hall v. Railway Co.*, 84 Iowa, 311, appellee moved to strike from the files an amendment to the assignment of errors on the ground that it was filed too late, and this court said: "It is permissible to file such amendments in the furtherance of justice,"—citing *Stanley v. Barringer*, 74 Iowa, 37. It is further said: "In this case it does not appear that the submission in this court has been delayed, nor that the appellee had been in any manner prejudiced by the filing of the amendment." The same is true of this case, and we think it should be considered on the amended assignment of error. See *Bunyan v. Loftus*, 90 Iowa, 122; *Buhlman v. Humphrey*, 86 Iowa, 597; *Stanley v. Barringer*, 74 Iowa, 34.

II. The questions argued will be better understood by noting briefly the controlling facts and contentions. There is no dispute but that about August, 1880, the plaintiff, an orphan aged about eleven years, of
4 foreign birth, and without means of support, was in the care of the Reverend Father McMenony, at Council Bluffs, for the purpose of being placed in a

suitable home. About that date defendants took plaintiff to their home on a farm where they resided, and he continued to live with them on said farm, as one of their family, until about March 15, 1895. During all that time the plaintiff was supported and cared for by the defendants, and worked industriously for them on the farm. There is some conflict in the evidence as to the care and support that plaintiff received, and as to the amount and value of the work which he performed, but these contentions only go to the amount that he may be entitled to recover. There is evidence of various conversations between plaintiff and the defendants, before and after he became of age, as to his compensation. It also appears that on January 19, 1895, which was after plaintiff came of age, he executed and acknowledged an instrument, which defendants caused to be recorded, as follows: "This is to certify that M. Feeley and Mrs. M. Feeley have this day made a full, fair, and complete settlement with me for all work that I have done for them, or either of them, to this date, by giving me a team of horses and a set of double farm harness, which are described in a certain bill of sale from them to me of even date herewith, and for which I hereby acknowledge receipt." Plaintiff contends that this instrument was executed without consideration and under duress. The court instructed that it was not without consideration, and submitted the question of duress to the jury, and this is assigned as error. The court also instructed that "the claim of defendants that plaintiff's claim is barred by the statute of limitations is not supported by the evidence." The giving of this instruction is also assigned as error.

III. Defendant's additional assignments of error are as follows: "(7) The court erred in overruling defendant's motion, made at the conclusion of plaintiff's case in chief, to withdraw from the jury all that part

of plaintiff's cause of action that accrued prior to March 1, 1890, as set out in count 1 of plaintiff's petition, for the reason that the contract under which
5 the alleged services were rendered was not an entirety, and was for personal services, and the cause of action arising thereon is for such period barred by the statute of limitations. (8) The court erred in refusing to give to the jury the instructions (pages 76 and 77, Abstract) asked by the defendants, for the reason that the evidence fails to show that the plaintiff was under duress at the time he executed the settlement in controversy. (9) The court erred in giving to the jury, on its own motion, instruction numbered 9½, for the reason that the evidence showed that all of plaintiff's claim arising prior to March 1, 1890, was barred by the statute of limitation."

The evidence as to the alleged duress is conflicting. If that on behalf of the plaintiff is entitled to greater weight and credit than that on behalf
6 of the defendants, the alleged duress is established. This was a question for the jury, and therefore there was no error in submitting that issue.

VI. We have seen that plaintiff went to live with the defendants about August, 1880, and continued to live with them, as one of their family, until March, 1895, and that he attained his majority April 4, 1890.

7 Having lived with the defendants, as one of their family, the presumption is that his services were gratuitous, and to recover for the services he must overcome that presumption. This he may do by showing "an express promise on defendant's part to make compensation therefor, or such facts or circumstances as will authorize the jury to find that the services, or some part thereof, were rendered in the expectation by the plaintiff of receiving, and by the defendant of making, compensation therefor." See *Resso v. Lehan*, 96 Iowa,

45. The evidence shows conversations between these parties, before and after the plaintiff became of age, with respect to his compensation. Defendants insist that plaintiff's evidence tends to and is relied upon as showing an agreement for a compensation to be paid when he came of age, that his cause of action thereon accrued at that time, and was therefore barred at the commencement of this action, July 10, 1895. They also contend that an agreement as to compensation to be therein made was entered into when the plaintiff came of age, and that, therefore, plaintiff's claim is not an open and continuous claim, and that all accruing prior to March 1, 1890, was barred by the statute of limitations. The evidence as to the conversations is as follows: Plaintiff says: "There was no real bargain made about pay in 1884, but Mr. and Mrs. Feeley told me that I should get a team and wagon and harness when I was of age, and then they again said they would give me also a piece of land. Didn't say what land they would give me,—forty or eighty acres. I expected them to do this. * * * No promise was made in 1885 about paying me for this work. * * * He said many a time, 'I don't want you to work for me for nothing, Frank; I will pay you for all you do,' and I relied upon his statements. At one time they told me they would buy a little farm called the 'Pulley Farm,' and would give me that,—about seventy acres. They didn't make me any promise before 1884. In the spring of 1890, when we was hauling hay, I told him I was twenty-one the fourth of that April. I told him I wanted to go to Missouri Valley to the machine shops. He offered to give me that land that was on the south side of the railroad tracks for what work I would do for two years for him; and I told him, 'Well, I don't care, I will have that much to fall back on.'" In another place he states that in that conversation Mr. Feeley "insisted on my staying;

and said, 'Frank, if you will stay with me two years, I will give you that strip of land on the other side of the railroad.' I said, 'That is hardly enough to keep a man busy, although it would be more than two years' work was worth.' After he had insisted upon my staying so hard, I says, 'It's all right,' and there it was left." Mrs. Feeley testifies as follows: "Last winter we agreed that he had three hundred dollars after he was twenty-one. It was worth one hundred dollars a year to take care of him until he was fifteen years old. About the time he was fifteen he agreed with us that he was to receive his board and clothes and to stay until he was twenty-one, to pay for the five hundred dollars that it was worth to take care of him until he was fifteen. That was to be in satisfaction of the first five years. I never heard anything about giving him a team and harness when he was twenty-one. Never said anything of the kind. Never said anything about giving him forty or eighty acres of land when he came of age. There was no talk of that kind in the house in plaintiff's presence. When he was of age I told him he could do as he liked. He said he had to stay some place,—might as well stay with us as any place else. Told him he could stay for one hundred dollars a year and his board and clothes and tobacco. Never said anything to him about giving him the land south of the Rock Island road. Mr. Feeley testified as follows: "The agreement with Father Mac. and me and my wife was that he was to stay at our place until he was twenty-one years old. We were to give him clothes and board and schooling. After he was twenty-one the agreement was between the boy and my wife that he was to work for one hundred dollars a year and his board and clothes and tobacco. Kept him three years and ten months under that agreement. Never heard that I was to give him

the land between the railroad tracks. There was nothing said of that kind." Mr. Feeley further testifies: "He talked of going to Missouri Valley. I told him he could not earn his board there. That's all that was said. Didn't offer to give him any land if he would stay." We do not think that this evidence, nor that of the plaintiff, taken alone, shows an express agreement as to compensation before plaintiff attained his majority. They were just such assurances as it was natural should be given by way of encouragement to the boy to continue to serve the defendants faithfully and industriously. There were just such assurances as tend to prove the expectations of the parties with respect to compensation, and to disprove the presumption of gratuitous services. Defendants each testified to an agreement after plaintiff came of age, that he was to work for one hundred dollars a year and his board, clothes, and tobacco. If an agreement was then in fact made covering the further services, that agreement must control as to such services, and, in that event, plaintiff's claim would not be an open and continuous account up to the time that he says he worked for the defendants, and all that preceded the agreement was barred at the time this action was commenced. Now, while we think there was nothing in the evidence to break the continuity of plaintiff's claim up to the time that he came of age, if an agreement was made as testified to by defendants, then clearly it did not continue to the end of the services. In view of this claim and evidence of the defendants, the court should not have instructed that plaintiff's claim was not barred by the statute of limitations, but should have submitted the question whether the alleged agreement was made, and instructed that, if made, plaintiff's claim, prior to the time he attained his majority, was barred; but that, if

said agreement was not made, then no part of his claim was barred. For this error we think the judgment of the district court must be REVERSED.

JAMES HOLLENBECK, Appellant, v. J. M. RISTINE.

Libel: SPECIAL DAMAGES. The publication of any untrue and
 1 malicious charge is libelous when damage is shown to have
 2 resulted as a natural and proximate consequence.

RULE APPLIED. Defendant wrote of plaintiff "He has for several years owed for medical services. His attention has been repeatedly called thereto to no purpose. That, finally, being sued there-
 1 for, he having no other defense, has cowardly slunk behind the statute of limitations. Such a course is not exactly in accordance
 2 with our ideas of strict integrity and we would prefer not to be connected in any official capacity with a corporation who employ such men in a position of trust." As a result plaintiff was discharged to his damage.

JUSTIFICATION: Jury question. Defendant pleaded that said statements were true and the publication justifiable. The evidence tended to show that plaintiff was paid and the statute of limitations
 6 not interposed. *Held*, as the justification must be as broad as the charge, the issue should have gone to the jury.

EXPRESSION OF OPINION. Criticism or expression of opinion concerning another must be founded on fact in order to avoid being libelous.

CONDITIONAL PRIVILEGE: Malice. A letter written to an employer
 8 concerning the conduct of an employe is, at most, only a conditionally privileged communication; and malice in publishing a conditionally privileged communication destroys the privilege.

ACTION IN TORT. Where one intentionally causes temporal loss to
 3 another without justifiable cause and with malicious purpose to
 4 inflict it, the natural and proximate damages may be recovered in
 5 an action of tort. And the name given an action is immaterial in determining whether sufficient facts are stated to show a right of recovery.

Evidence: ACCOUNT STATED: Jury question. It is a question for the jury whether the fact that a debtor retained a bill for services a
 7 long time without objection shows such acquiescence as to amount to an account stated, and, if there was, whether the items of the account were correct.

105 488
108 475

105 488
s114 363

105 488
126 711

105 488
128 206

105 488
d135 46

Appeal from Linn District Court.—HON. G. W. BURNHAM, Judge.

TUESDAY, MAY 17, 1898.

ACTION at law to recover damages for an alleged libel written of and concerning the plaintiff, resulting in his discharge from employment by the Cedar Rapids & Marion City Railway as a conductor upon its lines, and for loss of time and injury to reputation and means of support. Defendant admitted the writing of the alleged libel, and averred that it was both justifiable and privileged. The trial court directed a verdict for the defendant, and the plaintiff appeals.—*Reversed.*

Henry Rickel, John T. Christie and Jamison & Smith for appellant.

C. D. Harrison and Hubbard, Dawley & Wheeler for appellee.

DEEMER, C. J.—The alleged libelous publication of which plaintiff complains is the same one recently considered by this court in the case of *Hollenbeck v. Hall*, 103 Iowa, 214, and need not be set out in *extenso*. We held in that case that the publication was not libelous *per se*. The only difference between that case
1 and this is that, in this, plaintiff alleged and produced evidence tending to show that the defendant wrote the letter to Hall, who was president and manager of the Cedar Rapids & Marion City Railway, with intent to injure plaintiff, and to induce Hall to discharge him from the service of that company; that he had theretofore been in the employ of the company as a conductor for many years; and that, by the writing of said letter, plaintiff has been injured in his means of support, deprived of his employment, and lost valuable

time by reason of his discharge. This, as we understand it, is a plea for special damages; and the question at the threshold of the case is whether or not plaintiff can recover special damages resulting from the publication of a letter which is not libelous *per se*. It has been broadly stated that "all words are actionable if special damage follows." *Moore v. Meagher*, 1 Taunt, 39; *Barnes v. Trundy*, 31 Me. 321; Comyn, Digest, tit. "Action for defamation," D, 30. Again, it has been said that "special damage will not help you if the words are not defamatory." Blackburn, J., in *Young v. Macrae*, 7 Law T. (N. S.) 354, 3 Best & S. 264. To the same effect is *Sheahan v. Ahearne*, 9 Ir. R. C. L.

2 412. We apprehend that between these two statements is to be found the correct rule. Townshend, in his work on Libel and Slander (4th ed., section 197), says: "It may be correct to say that, to make the words wrongful, they must in their nature be defamatory; provided, the rule thus expressed be understood as being subordinate to and implied in the more comprehensive rule that, to render actionable that language which is not actionable *per se*, the language must occasion special damage, in the proper sense of that term;" that is to say, as we understand it, the damage must be the natural and proximate, although not the necessary, consequences of the wrongful act complained of. Townshend further says: "The real question must always be, was the damage complained of the natural and proximate consequences of the publication?" Judge Cooley, in his work on Torts (2d ed., p. 242), says: "Besides the publications mentioned [referring to those libelous *per se*], any untrue and malicious charge which is published in writing or print is libelous when damage is shown to have resulted at a natural and proximate consequence." This we regard as a correct statement of the rule, and it seems to be sustained by the

authorities. *Scholl v. Bradstreet Co.*, 85 Iowa, 551; *Morasse v. Brochu*, 151 Mass. 567 (25 N. E. Rep. 74);

Odgers, Slander & Libel, 89, 92, and cases cited.

3 If it be conceded, however, that there cannot be an action for libel unless the words are defamatory, still plaintiff may be entitled to relief under the allegations of his petition, although he may call it an action for libel. If one intentionally cause temporal

loss or damage to another without justifiable
4 cause and with malicious purpose to inflict it, that other may recover, in an action of tort, the

damages he has sustained as a natural and proximate result of the wrong. *Walker v. Cronin*, 107 Mass. 555; *Lucke v. Clothing Cutters' & Trimmers' Assembly*, 77 Md. 396 (26 Atl. Rep. 505); *Chipley v. Atkinson*, 23 Fla. 206 (1 South. Rep. 940). The name that plaintiff

5 has given his action is of no consequence, provided he has stated sufficient facts to show a right of recovery. We are firmly of the opinion that the petition stated a cause of action, and that the plaintiff introduced sufficient evidence to warrant the court in submitting the case to the jury, unless it be for some of the matters hereinafter considered.

II. Defendant pleaded that the statements made in the letter were true, and that the publication was justifiable. We think this was a fair question for the jury. Plaintiff adduced evidence tending to

6 show that he had paid defendant all that he owed prior to the time the letter was written, and that he did not interpose the plea of the statute of limitations as charged. It is well settled that the justification must be as broad as the charge, and of the very charge. Surely, there was evidence to go to the jury on this issue.

III. One of the grounds of the motion to direct a verdict was that the evidence showed an account stated

between the parties, and that this was conclusive on the question of indebtedness. The claim is
7 founded upon the fact that defendant sent his bill to plaintiff, who retained it beyond a reasonable time without objection. It is generally, and we believe correctly, held that an account stated is not conclusive, but is *prima facie* evidence of the accuracy and correctness of the items; and the strength of the presumption of correctness depends to some extent upon the circumstances of the case. In the case of *White v. Hampton*, 10 Iowa, 238, we said: "What will amount to a stated account from the presumed acquiescence of the parties arising from lapse of time, and their failure to object to the same within a reasonable period, must depend upon circumstances to be judged of by the nature of the transaction and the habits of business and course of trade." It was a fair question for the jury to determine whether there was such acquiescence by lapse of time as that there was an account stated, and, if there was, whether the items of the account were correct.

IV. It is said that the statements in the letter with reference to plaintiff's integrity and fitness for his trust were mere expressions of opinion, and
8 therefore not actionable. We do not think this is true; but, if true, the criticism must be founded on fact. Townshend, Slander & Libel, section 257.

V. Again, it is insisted that the communication was privileged, because directed to a person who was interested in knowing the conduct of plaintiff. The communication, if privileged at all, was conditionally privileged; that is to say, it must have
9 been made in good faith, believing the statements to be true, or having probable cause to believe them to be true. If he who published was actuated by malice, there was no privilege. There was as we have

already stated, evidence tending to show actual malice on the part of the defendant, and the trial court was in error in sustaining the motion upon the ground of privilege. We are not to be understood as affirming either that the truth was a defense, or that the communication was conditionally privileged; on these points we express no opinion, as they are not now involved. We simply say that, assuming these propositions to be true, still the court was in error in directing a verdict for the reasons heretofore given.

VI. There was evidence tending to show that plaintiff was discharged solely by reason of the letter written by defendant to Hall, and the case should have been submitted to the jury for their conclusion on the question as to the cause of discharge.

Other assignments of error are discussed by counsel, but, as the questions are not likely to arise upon a re-trial, we will not consider them. What we have said sufficiently indicates our views upon the controlling points in the case, and we conclude by saying that the case should have gone to the jury under proper instructions from the court.—REVERSED.

106	493
110	520

H. ANKRUM, Appellant v. THE CITY OF MARSHALLTOWN.

Plea and Proof: *OBJECTIONS: waiver.* Where defendant, without
 2 objection, permits plaintiff to introduce evidence of pain and
 3 suffering which tends to prove the alleged disability, he does not
 4 thereby concede plaintiff's right to recover for bodily pain and
 mental anguish not prayed for in the petition.

PERSONAL INJURY DAMAGES. Allegations that plaintiff suffered permanent disability in consequence of an injury will support a
 2 recovery for such disability as it existed, though it were not permanent; and under such pleading where the jury was instructed
 4 that plaintiff, alleging permanent injury, should recover all damages directly resulting therefrom and sufficient to compensate for the extent and duration of the injury, and all damages, present

and future, necessarily resulting, the fact that it specially found that the injury was not permanent does not limit the verdict to the actual pecuniary loss.

Amendment: *Discretion.* Refusal of leave to amend pleadings to 2 conform to proof was not an abuse of discretion, where the motion was made several days after verdict.

Appeal: *REVIEW: Objections below.* Plaintiff had a verdict but appealed from a refusal to allow him to amend after verdict and 1 from a reduction of his verdict. *Held*, errors assigned on matters occurring in the course of trial not brought to the attention of the court below by application for new trial, or otherwise, cannot be reviewed.

RULES AS TO SIZE OF TYPE. The fact that a paper filed in the supreme court is printed in type larger than is prescribed by the court rules 5 is not ground for striking it from the files, when the difference is so slight that it is not easy to say whether the rule has been violated.

Appeal from Marshall District Court.—HON. G. W. BURNHAM, Judge.

TUESDAY, MAY 17, 1898.

ACTION to recover five hundred dollars for personal injuries caused by a defective plank sidewalk. Defendant answered, denying generally. The case was tried to a jury, and a verdict in favor of the plaintiff for three hundred dollars, together with certain special findings, returned. On September 15, 1896, defendant moved for judgment, notwithstanding the verdict, and, subject to that motion, also moved to set aside the verdict, and to reduce the amount thereof to fifty dollars. Subject to both of said motions, the defendant on the same day moved for a new trial. On September 16th the plaintiff moved for leave to amend his petition as per amendment accompanying the motion. On September 23d plaintiff's motion for leave to amend and defendant's motion for judgment were both overruled, and defendant's motion to reduce the amount of the verdict to fifty dollars was sustained, and judgment entered

accordingly. No ruling was made upon defendant's motion for a new trial. Plaintiff appeals.—*Reversed.*

J. M. Holt and J. L. Carney for appellant.

C. H. E. Boardman and H. E. J. Boardman for appellee.

GIVEN, J.—I. Plaintiff assigns and argues errors as occurring in the course of the trial prior to the rendering of the verdict. The verdict is in favor of the plaintiff, and he has not complained thereof, by asking
1 a new trial, or otherwise, but is content therewith as rendered. He has not afforded the lower court opportunity to review these alleged errors occurring before the verdict, and cannot, therefore, be heard to urge them in this court. The only questions presented by this appeal are whether the court erred in refusing plaintiff leave to file his proffered amendment, and whether it erred in sustaining the defendant's motion to reduce the amount of the verdict. These questions we will now proceed to consider, and first as to the proffered amendment.

II. The petition, after charging negligence upon the defendant, and setting forth the manner in which the injury was received, alleges that thereby plaintiff "received great bodily injury and harm, and was made sick and lame, and was confined to his house and bed, and detained from his business, in the busiest season of the year, for a period of two months, in consequence whereof he was compelled to expend the sum of twenty dollars for help to take his place in the field as a farmer, and in the further sum of thirty dollars for medical attendance and nursing, and has been made permanently lame, causing a permanent disability, to his damage in the sum of four hundred and fifty dollars." The amendment which plaintiff asked leave to file was to

insert after the word "disability," as quoted above, the words, "and has suffered great mental anguish and bodily pain, and has undergone great physical suffering." This leave was asked to conform the petition to the proof made. While it is true the plaintiff and his wife were permitted to testify, without objection, to pain and suffering endured by the plaintiff, this evidence was admissible as tending to show the disability alleged, and was therefore not open to objection; and, by not objecting, the defendant should not be understood as having conceded plaintiff's right to recover for mental anguish and bodily pain. This application was not made until several days after the verdict was rendered, and was an application addressed to the discretion of the court. Whether to grant such leave was largely in the discretion of the court, and we have many times said that we will not interfere with the exercise of that discretion except where it appears to have been abused. Made when it was, we cannot say that the court abused its discretion in refusing to allow the amendment.

2

III. Defendant's motion to reduce the verdict was upon the ground that the damages prayed for in the petition, and as instructed by the court, were limited to the claim for help in the field, for medical attendance and nursing, and for being made permanently lame and disabled. The jury answered specially in response to the question, "Is plaintiff permanently injured?" in the negative. Defendant's contention is that by this answer the only damages that could be recovered, under the petition, were for the help in the field, and for medical attendance and nursing; but this, we think, is too contracted a view of the allegations of the petition. It alleges that plaintiff has been made permanently lame, causing a permanent disability, to his damage in the sum of four hundred and fifty dollars.

3

It is a familiar rule that a party is not always bound to prove all that he alleges. Here is an allegation of permanent lameness and permanent disability—an allegation of lameness and disability that would continue through the life of the plaintiff. Now, clearly, the plaintiff was not bound to prove that the disability would so continue, or to recover nothing on account thereof. Surely he might prove that it had continued, or would continue for a less period. If he had alleged that the disability was total, he would be entitled, under that allegation, to recover upon evidence that it was less than total. We have said that the evidence as

4 to mental anguish, pain, and suffering was properly admitted, without objection, as bearing upon the question of the extent and duration of the disability alleged; and while it may be true, as contended, that plaintiff is not entitled to recover, under the allegations of his petition, for pain and mental anguish, as a distinct element of damage, he was certainly entitled to recover for disability for what time it was shown that it had or might exist. The court instructed the jury that if they found that the defendant was negligent, and that the plaintiff was thereby injured, "then he is entitled to recover for all damages naturally and directly resulting to him from such injury as shown by the evidence"; also, that, to recover, the plaintiff must show that the defendant was negligent, and "that the plaintiff had suffered some substantial injury therefrom; that is, that he has been made sick or lame, or has been maimed or crippled, or has been put to some expense for medical or surgical attendance, by reason of the injury so sustained." The jury was also told that, if it found for the plaintiff, the amount of his recovery would be such sum as would fairly and reasonably compensate him for the necessary expense incurred in treating the injuries, loss of time, "and the extent and

duration of the injury, and all damages, present or future, which from the evidence can be treated as the necessary result of the injury complained of." Surely, under these instructions, the jury might very well have allowed the plaintiff for more than the help in the field and the medical attendance and nursing, notwithstanding their finding that he was not permanently injured. We think the court erred in sustaining the defendant's motion to reduce the amount of the verdict.

IV. Appellee, in its denial of, and amendment to, the abstract, asks, by way of amendment, that certain parts of the abstract be stricken out, as not material to the appeal. Appellant, in his denial of appellee's amendment, asks that certain parts thereof be stricken out, for the same reason. The parts thus asked to be stricken out are, we think, more or less pertinent to the questions presented by the appeal, and should not be stricken out. Appellee moves to strike appellant's

5 denial of amendment to abstract, "for the reason that it is not printed with type commonly known as small pica," as required by rule 66. In support of the motion, appellee, shows, by the affidavit of Will Ennis: That he is a practical printer; that appellant's denial is printed with what is known as "pica," a larger type than small pica, and that it consumes more space (runs less lines to the page, and less words to the line) than small pica. The denial is printed with a somewhat larger and plainer type than the motion, which is said to be in small pica. The difference is so slight that we cannot say that appellant's denial is not within the rule, and therefore the motion is overruled.

Our conclusion upon the whole record is that, for the error in sustaining the defendant's motion to reduce the amount of the verdict, the judgment of the district court should be reversed.—REVERSED.

F. S. GRIFFIN, Appellant, v. J. J. HOAG.

Contracts: STATUTE OF FRAUDS: *Consideration.* A verbal statement to a landlord by one on whose farm the tenant is to go the next season, that he will see that the landlord is paid his rent and that he will pay it before a specified time, is, where the lessor's lien is not released, a mere naked promise and void within the statute of frauds.

Evidence: EXCLUSION: *Harmless error.* Error, if any, in sustaining objections to certain questions is not prejudicial where the evidence sought to be elicited thereby is brought out in answer to other questions.

Appeal from Delaware District Court.—HON. A. S. BLAIR,
Judge.

TUESDAY, MAY 17, 1898.

ACTION on alleged oral promise to pay the note of another. Verdict and judgment for defendant, and the plaintiff appeals.—*Affirmed.*

E. E. Collins for appellant.

Bronson & Carr and *B. J. Wellman* for appellee.

LADD, J.—The lease of the farm by Mary E. Sheeley to F. W. Price expired March 1, 1894, and of the rent a note of one hundred and seventy-five dollars remained unpaid. This lease and note were assigned to the plaintiff in September, 1893. The evidence tended to show that in February, 1894, and while F. W. Price was in possession with his stock on the land, the defendant directed Simmons to tell the plaintiff that he would see that he was paid his rent; that he would pay it between then and March 1st as he wanted Price to go on his farm in good shape; that he

(Price) had some hogs and he wanted him to keep them, and wanted them to pay the rent between then and the first day of March. Simmons made known to the plaintiff what the defendant had said, and the former, in reliance thereon, informed Price that Hoag had agreed to pay his rent, and he could take his stock and go on Hoag's place, when he saw fit. Price did so, and took more than enough property, subject to the plaintiff's landlord's lien, to satisfy the note, which has not been paid. When the evidence on the part of the plaintiff had been introduced, the court directed a verdict to be returned in favor of the defendant. This was not error. The statement of Hoag was a mere naked promise to answer for the debt of another. The case is argued by the appellant as though the defendant had agreed to pay the note if the plaintiff would release his landlord's lien. This was not his proposition, nor did the plaintiff release his lien. Nothing prevented him from enforcing it after the removal of the property, as well as before. He parted with no right and the defendant acquired no advantage under the alleged promise. *Vaughn v. Smith*, 65 Iowa, 579; Code, section 4625; *Stemberg v. Callanan*, 14 Iowa, 251.

II. The evidence sought by questions to which objections were sustained was elicited by others; hence the rulings, if erroneous, were without prejudice.—
AFFIRMED.

J. J. MOSNAT, Appellant, v. F. E. SNYDER.

Libel: *PER SE: Attorneys.* A letter recited: "We are looking into the doing of this tribe of attorneys. It looks very much as though they put their heads together, and each of them get as much out of the estate as possible. An outside attorney told me a few days ago that M. had put a lien on the estate for \$1,250 on account of the heirs you represent, and \$500 extra to fight the church, making \$1,750 for one and the same thing. Outrage!"
Held to be libelous *per se*.

105	500
130	198
105	500
138	520

Appeal from Benton District Court.—HON. G. W. BURNHAM, Judge.

TUESDAY, MAY 17, 1898.

AN action for libel. The basis of the action is a letter written from Belle Plaine, Iowa, to Charles Kipp, of Pennsylvania. It appears from the petition that plaintiff is an attorney at law of some twenty years' standing and that the letter was falsely and maliciously published of and concerning him. The objectionable part of the letter is as follows:

Belle Plaine, Ia., March 26, 1894.

"Charles Kipp—Dear Sir: Your favor of the 24th at hand. Thanks for the same.

"We are looking into the doing of this tribe of attorneys. It looks very much as though they put their heads together, and each of them get as much out of the estate as possible. An outside attorney told me a few days ago that Mosnat had put a lien on the John Zeller estate for \$1,250 on account of the heirs you represent, and \$500 extra to fight the church, making \$1,750 for one and the same thing. Outrage!

"Besides this, that attorney says that, under the law of Iowa, a foreign corporation (such as the Ev. Church) could not inherit anything. If this is so, you heirs ought to have gotten that $\frac{1}{4}$ of the estate that the church got, in addition to what you did get. How is this? Do you think Mosnat got for you all he could, as he agrees in his contract, if that is correct. That lawyer further says that there was no court fight over the division at all; that the church lawyer, Mosnat, and Mrs. Zeller's lawyer made a division, and the court signed it. Now think of it. For this, Mosnat wants

\$1,750; the church attorney, I think, \$400.00; and Mrs. Zeller's attorney, \$900.00,—\$3,050.00. Then, the church attorney sells the church interest to Mosnat for \$2,500, which I think is certainly worth \$3,500 in my estimation, giving him another profit of about \$1,000. *Whether this was part of the agreement or not, I do not know.* I understand, Mosnat bought out three of the old country heirs for about one-fifth what they have in it, and so it goes. I wonder whether there was not some misrepresentation to those Germany heirs? Could you not write them, and find out, and let me know? It seems a shame to have things go in this way. John Zeller and I were always good friends, and I dislike to see so much of his property go to outside parties. Please let me know by return mail whether young John Zeller and Mrs. Mary Rabe, his sister, gave you or Mosnat power of attorney. They don't seem to know. John thinks he did, but Mary says she did not. Whatever is done must be done now (April term of court); hence I urge you to answer immediately.

"If an attorney will undertake to reduce these exorbitant charges made by Mosnat, will you be willing to let him try it on per cent., the same as Mosnat made an agreement with you, or nothing, if he gets no reduction?

"I am going to try to buy out a few of the heirs, so I have a personal interest, and then I can help do something.

"As it now stands, the Mrs. John Zeller's heirs got all they could expect, hence there is no trouble on our side; but our share in that extra \$500 Mosnat charges, the balance is all on your side of the question to explain about the per cent. spoken of on page 5. I mean like this: If he reduces it to \$100, then he would get \$25, and your heirs would make \$75, with no danger of losing anything. Mosnat, so I am told, bought out two of the Germany heirs for \$50. each.

"Excuse poor writing, as I am writing on a sick bed. Hoping to have you answer my questions by return mail, I am,

"Most respectfully yours,

"F. E. Snyder."

The petition seeks a recovery on the theory that the letter is libelous in itself, there being no claim of special damages or attempt to render the language actionable by innuendo. The answer is in six divisions, the first being a general denial, and the others admitting the writing of the letter, pleading the truth of the statements therein, matters in mitigation, and to show that the communication was privileged. It is made to appear in the answer that Kipp, to whom the letter was written, represented certain heirs of John M. Zeller, deceased, late of Benton county, Iowa, and that defendant was acting as administrator of the estate of Anna M. Zeller, deceased, late of said county, who survived said John M. Zeller as his widow; that both Kipp and defendant, in their representative capacities, were interested in the settlement of the estate of said John M. Zeller; that Kipp employed defendant as attorney to look after the interest of the heirs of said estate whom he represented; that he wrote the letter in suit in answer to a letter from said Kipp, making inquiries as to the settlement of said estate, in which he and said Kipp were mutually interested; and that he had reason to, and did, believe the statements in said letter to be true; and that the letter was written in good faith, without malice, and for the purpose of advising said Kipp as to the general condition of the estate. The cause proceeded to trial, to a jury; and, at the close of the evidence, the court, on motion of defendant, directed a verdict for him, and, from a judgment thereon, the plaintiff appealed.—*Reversed.*

Tom H. Milner and J. J. Mosnat for appellant.

Gilchrist & Whipple, C. Nichols and C. W. E. Snyder for appellee.

GRANGER, J.—I. We are first to consider the question, is the letter libelous *per se*? In considering this question, care must be taken to disregard facts, necessarily in mind from a reading of the record, that are foreign to the question. Our statutory definition of "libel," so far as it is applicable to this case, is as follows: "A libel is the malicious defamation of a person made public by any * * * writing * * * tending to provoke him to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse." Code 1873, section 4097. In *Hollenbeck v. Hall*, 103 Iowa, 214, we quoted, as defining the word "defamation" as follows: "Words which produce any perceptible injury to the reputation of another." "A false publication calculated to bring one in disrepute." To render the letter libelous, it must be defamatory, in the sense indicated, and tend to some of the consequences specified in the statute quoted. In determining this, we must take the scope and object of the whole letter, when read and considered together, and see to it that such meaning be given to the language as naturally belongs to it. *Military Academy v. Gaiser*, 125 Mo. 517 (28 S. W. Rep. 851); *Cooper v. Greeley*, 1 Denio, 358. Without any doubt, the letter speaks of the charges as *outrageous* and *exorbitant*. The word "outrage" is variously defined, and the particular definition to be applied should be the one indicated by considering the word in the connection in which it is used. It signifies a bold or wanton injury to person or property, wanton mischief,

gross injury, etc. Under all definitions, it is an aggravated wrong. Take, first, the following paragraph of the letter: "We are looking into the doings of this tribe of attorneys. It looks very much as though they put their heads together, and each of them get as much out of the estate as possible. An outside attorney told me a few days ago that Mosnat had put a lien on the John Zeller estate for \$1,250 on account of the heirs you represent, and \$500 extra to fight the church, making \$1,750 for one and the same thing. "OUTRAGE!" Nothing in the letter can take from that language the meaning that the plaintiff and others, from appearances, were acting together to wrongfully take from the estate as much as possible. The statement is absolutely inconsistent with honest purposes, and must be so understood. The language of the paragraph, to us, admits of no other conclusion than that the plaintiff, in his professional capacity, had acted outrageously dishonest in taking from the estate. The other language of the letter intensifies, rather than weakens, such a conclusion, for it presents facts and figures from which the statement appears to be true, and they were evidently so intended. A quite conclusive test is this: If the statements fairly deducible from that letter are true, the plaintiff is not an honest man in his professional doings, and is not entitled to public confidence. No discreet business man, believing those statements, would intrust him with business of such a character. Such a publication, of course, brings one into disrepute, and produces a perceptible injury, if not true. To test the question of the letter being libelous on its face, we treat the statements as untrue. It is not to be questioned that the letter imputed to the plaintiff gross professional misconduct. In *Sharpe v. Larson*, 67 Minn. 482 (70 N. W. Rep. 1, 554), it is said: "Publication which imputes to one holding an office improper misconduct

therein, or to an attorney at law professional misconduct, is libelous per se." The same rule is stated in Odgers, Slander & Libel, 26. In *Military Academy v. Gaiser, supra*, it is said: "Words which on the face of them, when falsely published of a party, in connection with his trade or profession, must necessarily injure him with respect thereto, or which directly tend to the prejudice of such person in his trade or business, are actionable in themselves without proof of special damages." The proposition has abundant support on authority. We think the letter libelous in itself.

II. It is thought that, notwithstanding the letter is libelous in itself, it appears that it was a privileged communication. The question is to be determined from the evidence. On this question, each party is claiming that the evidence is so without dispute that the law settles it in his favor. We think neither conclusion is the correct one. It is a question for the jury under proper instructions. No instructions were given, and there is no reason to apprehend but that the law will be properly stated by the court. We must not attempt a discussion of the evidence in view of a new trial.

III. It is urged that the record shows that the statements in the letter are true, and hence that the ruling of the court is sustained. We doubt the court's being controlled by such a thought. While, in some respects, what is said in the letter is shown to be true, that cannot be said, as a matter of law, of what it thought to be defamatory. We should not, and do not, attempt any discussion of the evidence. We think the cause should be submitted to a jury, so that it may settle the facts as to the truth or falsity of the publication, and, if true, let the plaintiff take the consequences as he deserves them. If false, and defendant has no legal excuse for his act in publishing it, he, too, should be answerable for his misconduct in damages. The judgment is REVERSED.

AUGUST GORING, Appellant, v. H. J. FITZGERALD.

106	507
112	50

Fraud: SCIENTER: Evidence. Evidence that a lawyer stated to a judgment creditor that he owned the judgment, when he had no
 6 title thereto, in reliance upon which the debtor gave him a note for the amount thereof, is sufficient proof, in the first instance, of his guilty knowledge of the falsity of the statement.

106	507
135	289

INJURY BY. A judgment debtor who is induced to give a note for the amount of the judgment to one who falsely represents himself to
 4 be the owner of the judgment, which note he subsequently pays, may recover from the one making the representation the amount so paid, although he had not yet been compelled by the rightful owner of the judgment to pay the same.

RELIANCE: Evidence. That a judgment debtor looks at the judgment record and sees that no assignment of the judgment to one
 5 who falsely represents to be the owner has been filed, is not conclusive that he was not justified in relying upon such representations in giving the note for the amount of the judgment.

Action for Damages: RESCISION: Offer to return. An offer to return securities given as a part of a transaction is not a necessary pre-
 7 requisite to an *action for damages* for falsely representing himself to a judgment debtor to be the owner of the judgment.

Pleading: STATUTE OF LIMITATIONS: Answer or demurrer. The defense that a claim in suit is barred by limitation can be taken
 2 only by answer and not by demurrer, where the petition does not show on its face that the claim is barred.

Striking Pleading: HARMLESS ERROR. Possible error in striking out
 3 portions of a petition is not prejudicial, where there is sufficient remaining to raise the issue relied on.

Appeal: REVIEW OF DIRECTED VERDICT: Evidence. Only the evidence received need be considered on appeal, in passing upon the
 1 action of the court in taking the case from the jury.

Appeal from Floyd District Court.—HON. J. F. CLYDE,
 Judge.

TUESDAY, MAY 17, 1898.

THE petition of plaintiff sets out a cause of action as follows: In April, 1889, there stood against plaintiff

on the records of the court in Floyd county, a judgment in favor of the Hawkeye Insurance Company for about the amount of sixty dollars, and also a judgment in favor of the Floyd County Savings Bank for an amount approximating two hundred dollars. That at this time the defendant claimed he was the attorney for the Hawkeye Insurance Company, and that he had purchased, and owned, the bank judgment, and by these means induced plaintiff to execute and deliver to him a promissory note for the sum of two hundred and fifty dollars, drawing interest at the rate of ten per cent. per annum. That this note was afterwards renewed, and was finally paid by plaintiff. It is also charged that the representations made by defendant were false; that he was not the attorney for the Hawkeye Insurance Company, and had no right to receive payment of said judgment; and that he did not own the bank judgment. It is alleged that plaintiff has been obliged to pay the judgment in favor of the insurance company to the proper parties, and that defendant not owning the bank judgment, did not have any right to receive the money therefor; that said judgment still stands as a claim against plaintiff. It is further alleged that on February 20, 1893, the defendant, by threats of forcing payment of the note so given induced the plaintiff to give him a mortgage, to secure said debt, covering certain real estate in Chickasaw county, in this state, and in the spring of 1894, by threatening foreclosure proceedings, he wrongfully induced plaintiff to deed him the mortgaged premises at much less than their real value. The petition is divided into three counts, but the facts stated, in reality, constitute but a single cause of action. Defendant's first answer seems to have been a general denial. This was amended later, and the following defenses interposed: Defendant admits procuring from plaintiff the promissory note as stated,

but avers that he represented to plaintiff at the time that he was negotiating for the purchase of the Hawkeye Insurance Company's judgment, and that he stated to plaintiff that, if he failed to obtain it, he would credit the amount on the note; and defendant says that he did fail to get title to said judgment, and that he gave defendant credit for the amount by indorsement on said note. He admits that the amount of the bank judgment, which he says was more than two hundred and fifty dollars, was included in said note. He denies the charge that he had no right to collect said judgment, and that the same is unpaid; admits taking a mortgage on the real estate as alleged by plaintiff, and thereafter taking a deed from plaintiff of the land. Later, defendant pleaded, in an amendment to his answer, the statute of limitations. Plaintiff, by way of amendment to his petition, charged that all of the statements and representations so made by defendant, set forth in the original petition, were false and fraudulent, and were so known to be by defendant, at the time he made the same; that the falsity of said representations was fraudulently concealed from plaintiff until about December, 1894, when he first learned the facts. On defendant's motion to make this last pleading more specific, plaintiff filed an amendment in which he attempted to state when the fraudulent representations were made, and in what they and the fraudulent concealments consisted. The matters relating to the alleged fraudulent concealments were stricken out by the court on motion of defendant. Upon the pleadings in this condition, the cause was tried to a jury. At the conclusion of the evidence for plaintiff, defendant moved for a verdict in his favor. This motion was sustained. The jury returned a verdict accordingly, and from a judgment thereon against plaintiff for costs he appeals.—*Reversed.*

Robert Eggert for appellant.

P. W. Burr and *H. J. Fitzgerald* for appellee.

WATERMAN, J.—Appellee objects to a consideration of the case here because he says, first, that the evidence is not properly identified. We see no merit in this objection. Next he claims that the judge's certificate does not state that all the evidence offered is in
1 the record. This might be admitted without its affording any basis for the claim that the appeal shall not be heard on its merits. We are asked to pass on the court's action in taking the case from the jury. In doing this, we are called upon to consider only the evidence that was received, and this is properly before us.

I. Plaintiff moved to strike from the files defendant's amendment to his answer, in which the statute of limitations is set up. This motion was overruled, and this action of the court is made the basis of the first
2 assignment of error. Plaintiff claims that this objection should have been taken by demurrer.

But plaintiff insists that his petition, as amended, not only does not show upon its face that his claim is barred by limitation, but on the contrary, discloses that such is not the case. According to his own contention, this defense could be made only by answer.

II. The next assignment of error relates to the court's action in striking out of the amendment to the petition the facts which it is alleged amounted to a
3 concealment of the fraud practiced upon plaintiff. This error, if, indeed, it was an error, was without prejudice. While the specific facts charged were stricken out, there was left in the petition, as amended, the general allegation that the facts

were fraudulently concealed from plaintiff, and the truth not discovered by him until in the year 1894.

III. The next assignment of error presents the gist of the controversy. Was there anything in plaintiff's case for a jury to pass upon? The fraud, if any, consisted in the statements and representations made in 1889 to induce plaintiff to execute the first note. Plaintiff introduced evidence tending to prove the representations charged, and also their falsity. It was shown that defendant did not own, and had no authority to collect, the judgment of the Hawkeye Insurance Company; and there was some evidence to the effect that he did not own the bank judgment. It was established beyond dispute that plaintiff has had to pay the first of these judgments to another party since the giving of the note to defendant. Defendant's first claim

4 is that plaintiff has been in nowise injured; that the amount of the judgment which he has paid has been credited on the note, and that it does not appear that he has ever been called upon to pay the other judgment. This reasoning does not strike us as satisfactory. If defendant falsely represented himself to be the owner of the bank judgment, and thus secured its payment to him in money or property, we think he may well be called upon by plaintiff to refund, without waiting until the latter is compelled to pay the rightful owner. If the judgment creditor saw fit not to enforce his claim, it would not afford any ground for defendant keeping what he had wrongfully obtained.

IV. Next it is said in justification of the trial court's action that plaintiff's claim was barred by limitation. But we think, under the pleadings, this was peculiarly a question for the jury. The fact that

5 plaintiff looked at the judgment record, and saw that no assignment of either judgment to defendant had ever been filed, while a circumstance to be considered, was by no means conclusive. Defendant might

well have been the owner of these judgments without there being any recorded assignment.

V. Next it is said in behalf of defendant that there is no evidence that he knew the representations made to be false. The statement of this proposition refutes it.

Scienter may be established by circumstances.

6 If a man (a lawyer, especially) says that he owns a judgment to which he has no title whatever, no other proof of his guilty knowledge need be given in the first instance. As having some bearing on this branch of the case, we cite *Melick v. Bank*, 52 Iowa, 94.

VI. Again, it is urged that plaintiff should have returned, or offered to return, certain securities which he received from defendant in the course of their trans-

7 actions, and that, not having done so, this action cannot be maintained. This action is not to rescind the contract, but to recover damages. The rule sought to be invoked does not apply here. The principles governing an action of this character are the same as in case of a breach of warranty. *Joy v. Bitzer*, 77 Iowa, 73.

VII. Finally, it is said that the action of the lower court was authorized because plaintiff established no sufficient basis for damages. It is enough to say on this point that if defendant, without any right, obtained from plaintiff money or property in payment of the bank judgment, this of itself would afford a claim for substantial damages. Our conclusion is that the case should have gone to the jury. The judgment below is therefore REVERSED.

F. W. WOLFORD V. ANDREW A. YOUNG, Appellant.

Payment: APPARENT AUTHORITY OF AGENT. A vendor of land who has the note and mortgage given for the purchase price made payable at the office of an investment company at which a note and mortgage for other land previously sold to the same purchaser

had been made payable, and to which company payment was duly made and forwarded by it to the vendor, cannot recover from the purchaser for money paid to such company on the second note and mortgage, although it is not forwarded to the vendor, and it did not, at the time of receiving the payment, have the note and mortgage. Especially when payment to such agent was not for the payer or his convenience, and where the agency, if not wholly needless, was used for the convenience of the payee.

Appeal from Boone District Court.—HON. S. M. WEAVER,
Judge.

WEDNESDAY, MAY 18. 1898.

THE following is appellant's statement of the facts and the issues. On the ninth day of March, 1889, the appellee, who then resided and now resides in Boone county, Iowa, purchased of the appellant certain land in Boone county, and gave the appellant the note and mortgage in controversy in this action in part payment thereof; the said note being for the amount of four hundred dollars, and attached thereto in the usual form, interest coupons calling for twenty-eight dollars annual interest during the period of said note, being until 1894. The said note was made payable at the Wilson & Toms Investment Company, St. Louis, Mo. The appellant executed a deed for the land thus conveyed, and was at the time, and is now, a resident of Syracuse, N. Y. The negotiations for the sale and purchase of the land appear to have been conducted through one J. C. Hall, then a law partner of Hon. D. R. Hindman, of Boone, Iowa. The appellee, as the interest coupons became due, remitted to the Wilson & Toms Investment Company, at St. Louis, the amount due thereon, and received from them in the ordinary course of mail an acknowledgment of the same in the following form: "Central Trust Company, Oriel Building, Sixth and Locust streets, St. Louis, Mo. Dear Sir: Your favor for principal and interest is received, with inclosures. Papers

will be sent as soon as received from the East. Central Trust Co. St. Louis, Feb. 25, 1894." During the time of the existence of this company the above form was used at each and every remittance by appellee, and prior to that time the same form was used by the Wilson & Toms Investment Company, which was succeeded by the Central Trust Company, by a reorganization. Long prior to the making of the note and mortgage in controversy herein, the appellee had purchased other land in Boone county from the appellant, had given a note and mortgage for part of the purchase price thereof, and it had been made payable at and paid to the Wilson & Toms Investment Company, St. Louis, Mo., except the last payment of interest and principal, which was paid to the Central Trust Company, they having at the time possession of the note, mortgage, and satisfaction thereof. In all the foregoing payments of interest except the last on the four hundred dollar mortgage note, the appellant remitted to the St. Louis company the amount due, and they in turn remitted the same to appellant, and he then sent the interest coupon to them, and they in turn sent the same to the appellee. In the last instance, the payment of principal and interest in the amount of four hundred and twenty-eight dollars, the appellee sent the amount to the Central Trust Company, received the usual reply that the same had been received, and that the papers would be sent as soon as received from the East, but the Central Trust Company failed to remit the amount, or any part of it, to the appellant, and on the thirty-first day of May, 1894, made an assignment to W. F. Leonard, the secretary of the company. This action was afterwards, on the —— day of ——, 189—, begun by the appellee as plaintiff, demanding that the note be canceled, and the mortgage satisfied of record. The appellant interposed his defense, alleging that the note had not been paid, nor

the mortgage satisfied, and asking a foreclosure of his mortgage according to the terms thereof, and for judgment against appellee for amount of note, interest, and costs. The district court gave judgment for the plaintiff, and the defendant appealed—*Affirmed*.

J. M. Goodson for appellant.

Crooks & Snell for appellee.

GRANGER, J.—As we determine the case on the undisputed facts, we need not refer to questions presented as to the admissibility and competency of evidence. Appellant cites and relies on a rule of undoubted authority: "That, if a debtor owing money on a written security pays to or settles with another as agent, it is his duty, at his peril, to see that the person thus paid or settled with is in possession of the security. If not thus in possession, the debtor must show that the person to whom he pays or with whom he settles has special authority, or has been represented by the creditor to have such authority, although for some reason not in possession of the security." The rule has express sanction in this state. See *Security Co. v. Graybeal*, 85 Iowa, 543; *Fisher v. Lodge*, 50 Iowa, 459; *Draper v. Rice*, 56 Iowa, 114; *Tappan v. Morseman*, 18 Iowa, 500. So far as we know, the rule has the sanction of authority generally. But we think the facts of this case take it out of the rule stated. The defendant resided in the state of New York, and the business, on his behalf, in making the sale of both pieces of land to plaintiff, was done by one J. C. Hall at Boone, Iowa. We inquire for the mutual understanding of the parties when the sale was made. A long time prior to the transaction in question the defendant had sold to plaintiff another tract of land, and the notes had been made payable at the office of the investment company in St. Louis. The money for the

interest had been regularly sent to that office and from that office to the defendant, who returned the interest coupons, and, lastly, the note, to the investment company, who sent them to the plaintiff. The investment company was in no sense a necessary agency in the doing of the business, nor even a convenience. Its location was distant from both parties, so that the cause of its agency was a matter exclusively between it and the defendant. The payments there were not in any sense for or at the instance of plaintiff. The provision therefore must have been at the instance of defendant, and to subserve his purposes. The second transaction, out of which originated the note in question, was made in the light of the other, and it is not too much to say, as a matter of fact, that both parties must have understood, when the same terms were fixed as to the place of payment, that it would be observed as was the other, by the money being paid to the company, to be sent forward, and the securities returned through the same channel. If the parties so understood, it was a special authority for such payments to be made at St. Louis, and the defendant should be bound by them in the absence of notice to plaintiff to discontinue such payments. The conclusion of fact as to the authority seems fully warranted. If we are warranted in saying the provision as to payments being made at St. Louis was for the defendant, and it is a fact that he lived in New York, the question naturally arises, what was it for? If, because of business relations between defendant and the company, then defendant must have understood that the money would be sent there, and that the securities must be there for return to the plaintiff, or the company must take the money as it did, and send it to New York to get the securities for return to the plaintiff. That the company at St. Louis was the agent of defendant admits of no doubt, but that fact would not make a

payment to it binding, if it had not the securities, unless there was authority for such a payment; and we reach the conclusion that there was such authority, and that it was an agency purely in the interest of the defendant, in no way a necessity or convenience in the doing of the business between the parties; that plaintiff would naturally understand the money was to be sent there as payment, and that the parties acted in accord with such an understanding in carrying out the transaction. Nothing in the transactions justifies a conclusion that the plaintiff would or should have sent his money to the company at his risk, and it must have been understood, when the place was selected for payment, that the money would be sent there for that purpose. The judgment is AFFIRMED.

JACOB FULLMER, Appellant, v. AUSTIN BECK.

Adverse Possession. No formal claim of ownership to a fence is necessary on the part of one whose possession and ownership up to the fence are unquestioned, in order to make such possession adverse.

RULE APPLIED. The evidence showed that the strip in controversy was a part of the original government sub-division owned by plaintiff. About the year 1855 one M. purchased the land owned by defendant, and in 1858, after a private survey, built a fence on the line established, which included the strip in controversy, and occupied and claimed to own the land up to the line. About the year 1863 F. purchased the land, and in 1869 planted a hedge fence as near the fence previously erected as it could be built. Defendant purchased the land in 1892, and testified that he occupied and claimed to own the strip in controversy for more than ten years before it was disputed by any one. His occupation was open and notorious, although the deed under which he held described his land as a government sub-division, and he testified he claimed nothing more than what was contained therein. *Held*, that defendant had acquired title to the strip in controversy by adverse possession.

106	517
107	556
108	517
111	658
105	517
124	733

Appeal from Benton District Court.—G. W. BURNHAM,
Judge.

WEDNESDAY, MAY 18, 1898.

ACTION at law to recover possession of certain real estate, and damages for its detention and use. At the close of the evidence, a verdict was returned for the defendant, by direction of the court, and judgment was rendered in his favor for costs. The plaintiff appeals.—*Affirmed.*

Tom H. Milner for appellant.

Struble & Stiger for appellee.

ROBINSON, J.—The plaintiff claims to be the absolute and unqualified owner of a forty-acre tract of land, which is described, and the defendant is the owner of an adjoining tract of forty acres. The controversy between the parties is in regard to the ownership of a strip of land two rods wide and eighty rods long, which is on the boundary line between the two tracts. The evidence tended strongly to show that the strip was a part of the original government subdivision of land now owned by the plaintiff; but the evidence also showed, without material conflict, that the strip has been used and occupied as a part of the tract now owned by the defendant for about forty years. We are required to determine whether the evidence so clearly shows that the defendant is the owner of the strip, by virtue of adverse possession under claim of title that the court was justified in directing a verdict for him. About forty years before this action was commenced, the tract now owned by the defendant was purchased by Levi Marsh. About the year 1858, he had the boundary line in question established by a private survey, built a fence

on that line, and broke and occupied and claimed to own the land on his side up to that line. His right of possession and claim of ownership, so far as he knew, were never disputed. After owning the land about eight years, he sold it to Charles S. Fuller, who farmed it to the limit of the fence until the year 1882, when he sold it to the defendant. In 1869, Fuller planted a hedge fence as near the fence built by Marsh as it could be placed; and since that time, until a short time before this action was commenced, that hedge has been maintained and treated as the boundary line between the two tracts. A few years after Fuller bought the land as stated, one of his sons bought the land now owned by the plaintiff, and owned it until the year 1870. During that time he farmed his tract up to the fence, and his grantees have done the same. The defendant has occupied his land since he purchased it, and, when this action was commenced, had occupied the strip in controversy under a claim of ownership for about fourteen years, and his claim does not appear to have been disputed by any one until May, 1895, when the plaintiff caused a survey of the land to be made, and since that time he has claimed to own the strip. It is said that the defendant and his grantors did not claim to own anything not included in the government subdivision of land described in the conveyances to them; and it is quite probable that the boundary line in dispute was originally located by mistake. But the evidence does not show that the defendant and his grantors did not claim beyond the government boundary line. Although the evidence as to the claim under which the defendant's grantors held possession is not satisfactory, yet it does show that they occupied to the line of the fence, and justifies the presumption that they so occupied adversely and under claim of ownership. The evidence on the part of the defendant is more explicit. He testifies that he had occupied

the strip of land in dispute, and that he claimed to own to the hedge, for more than ten years prior to the commencement of this action. His occupation and exercise of dominion over the strip were continuous, open, visible, and notorious for more than ten years before they were disputed by any one. It is true that the deed under which he holds describes the land he claims as a government subdivision, and not by metes and bounds, and that in answer to the question, "You do not claim anything more than what is described in the deed there, do you?" he answered, "No; I don't know that I do." But it is evident from his entire testimony that the answer was based upon the effect which he believed should be given to the deed, and was not intended to state that he did not claim title to the strip. It is also true, that after stating that he always claimed to own the land to the hedge, he stated that he did not so claim to any one; but as his possession and ownership were unquestioned, formal claim of ownership was not required. His occupation and use of the premises under the circumstances stated were a continuous and public assertion of title. *Crapo v. Cameron*, 61 Iowa, 447.

The undisputed facts of the case do not bring it within the rule of *Grube v. Wells*, 34 Iowa, 148. In that case the defendant's grantor inclosed lot 1, which he owned, and, in inclosing it, by mistake inclosed a part of lot 260 adjoining, which was, and until four or five years before the commencement of the action remained uninclosed. The defendant and her grantor intended only to claim lot 1, but supposed that included all of the premises inclosed. It was held that title by prescription had not been acquired to the inclosed part of lot 260. In this case the owner of each of the adjoining forty-acre tracts occupied to the fence, and no further. As both tracts were improved, the occupation

of the strip in dispute was in the nature of an assertion of title to it, and the occupation of the defendant was with an intent to claim title. Had the defendant and his grantors intended to claim ownership only of the government subdivision, and not of the strip in question, unless it was a part of that subdivision, the occupation would not have been adverse, under the doctrine of *Grube v. Wells*, because not based on the claim of ownership. Much of what we have said of the case last cited applies to the cases of *Skinner v. Crawford*, 54 Iowa, 119; *Mills v. Penny*, 74 Iowa, 172; *Fisher v. Muecke*, 82 Iowa, 547; *Heinz v. Cramer*, 84 Iowa, 497; *Goldsborough v. Pidduck*, 87, Iowa, 599, and *Jordan v. Ferree*, 101 Iowa, 440, also relied upon by the appellant. This case is, in principle, more nearly like the cases of *Doolittle v. Bailey*, 85 Iowa, 398; *Hiatt v. Kirkpatrick*, 48 Iowa, 78; *Meyer v. Weigman*, 45 Iowa, 579; *Brown v. Bridges*, 31 Iowa, 138; *Close v. Samm*, 27 Iowa, 503; *Burdick v. Heirly*, 23 Iowa, 511. We reach the conclusion that the district court was fully justified in directing a verdict for the plaintiff. The appellant complains of certain rulings of the court, but we think without sufficient reason. The judgment of the district court is **AFFIRMED**.

W. H. KENNEDY V. NELLIE M. ROBERTS, Appellant.

Duress. Duress in the making of a contract exists when the person making it is induced to do so by being put in fear by means of threats of arresting and unlawfully charging him with crime,
 1 when the threats and the fear thereby induced are such as would influence a man of reasonable courage and prudence, and deprive the party making the contract of the exercise of free will in making it, provided that the threatened arrest is wrongful and unlawful and apparently about to be enforced.

Blackmail: DURESS: *Pleading* Code 1873, section 3871, makes it an offense for any person to maliciously threaten to accuse another of a crime with intent to extort any money or pecuniary advantage whatever, or compel the person threatened to do any act against

105	521
131	100
105	521
142	7

his will. *Held*, that it is not necessary in a suit to recover a note given under duress for the one threatened to plead his innocence of the crime which the other party threatened to accuse him of committing.

SAME. An allegation that defendant wantonly and maliciously made the threats for the purpose of extorting the note, and as a result of those threats plaintiff was put in fear and was compelled to execute the note without any consideration, is a sufficient showing that the threats were immediate, and without immediate means of prevention, and were such as would operate upon a person of reasonable courage.

RATIFICATION. An intention by the maker of a note obtained by duress, to ratify the same, is necessary in order that any ratification shall be binding upon him.

Replevin: ADDITIONAL BOND. Plaintiff in replevin to recover possession of a note should not be required to give an additional bond on the ground that the bond originally given is less than the value of the note, where pending the motion the note is brought into court and deposited with the clerk to abide the judgment of the court.

Pleading: REPLEVIN. The petition in replevin to recover the possession of a note need not allege that defendant wrongfully detained the note.

SAME. A petition in replevin to recover the possession of a note reciting that such note is of no value except as a matter of evidence, and that for such purpose only it is of a specified value, sufficiently alleges the actual or apparent value as required by the statute.

Instructions: FAILURE TO GIVE. Where a defense is stated in a very obscure manner, and no request is made for an instruction upon that point, it is not error for the court to overlook it in giving its instructions.

Appeal: OBJECTION BELOW. In replevin an objection that the complaint does not allege that the property replevined was wrongfully detained by the defendant, is waived by a failure to object in the trial court.

HARMLESS ERROR: Striking pleading. A refusal to strike out matter from a pleading on the ground that it is a repetition is without prejudice.

EVIDENCE. Although evidence in an action to recover the possession of a note, that plaintiff demanded the note before bringing the suit is irrelevant and immaterial where the note was wrongfully obtained from plaintiff, its admission is not prejudicial to defendant.

SAME. Any faults in an instruction concerning the consideration of
14 a note in question are cured by a special verdict of the jury that
the note was founded upon a valuable consideration.

SAME. Refusal of a motion to require plaintiff in replevin to give an
6 additional bond, if error, is not prejudicial to defendant where
the jury by their verdict find the plaintiff entitled to the property.

Appeal from Montgomery District Court.—HON. A. B.
THORNELL, Judge.

WEDNESDAY, MAY 18, 1898.

ACTION in replevin to recover the possession of a promissory note. The note is for five thousand dollars, and was executed by plaintiff to Nellie M. Roberts. Plaintiff claims that it was obtained from him without consideration, through fraud and duress, and is therefore void. Defendant interposed what was in effect a general denial. The case was tried to a jury, resulting in a verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

C. E. Richards, R. W. Beeson and P. W. Richards for appellant.

J. M. Junkin and Smith McPherson for appellee.

DEEMER, C. J.—Plaintiff and defendant were married in the state of Massachusetts in the year 1866. Defendant then had a husband living, from whom she had not been divorced. Almost immediately after their marriage they took up their residence in the state of Illinois, where they resided until the year 1871, when they moved to Montgomery county, Iowa, where they lived as husband and wife until the year 1883. In the latter part of that year defendant left Iowa for the state of Rhode Island, ostensibly upon a visit, but really with the intention of abandoning her husband. Soon after she was discovered living with one Roberts, a former

resident of Montgomery county, in the city of Providence, R. I. Discovering this fact, plaintiff brought suit for divorce against his wife, and obtained a decree in the district court of Montgomery county in the year 1887. Defendant's former husband obtained a divorce from her in the year 1867. After plaintiff obtained his decree, he gave his wife a house and lot in the town of Villisca worth about four thousand dollars, and also made an agreement whereby he undertook to pay her the sum of one hundred dollars per year for support. Sometime in the year 1884 a letter came to the post office addressed to the defendant. The plaintiff took this letter from the office, opened, read, and burned it. Some time in the year 1894 a man, who represented his name to be Snell, and who claimed that he lived in the state of Maine, appeared at plaintiff's home in Montgomery county. He claimed to be defendant's brother, and said he had come to get some money for his sister.

1 Plaintiff claims he threatened that, if it was not given him, he (Snell) would have plaintiff arrested, not only for opening the letter, but for living in adultery with his sister. Afterwards defendant and Snell both met plaintiff, and, as he claims, by threats of arrest and of prosecution for the offenses above named, induced him to give the note which is in controversy. The note was taken away by the defendant. Acting upon the advice of an attorney, plaintiff wrote a letter to defendant's daughter, saying, in effect, that if her mother wanted the interest on the note she had better send it to some bank in Montgomery county. The note was sent, and plaintiff thereupon brought this suit to recover it.

I. Appellant's first claim is that the court had no jurisdiction of the case, for the reason that there is no allegation in the petition that the defendant wrongfully

detained the note. In support of this contention, reliance is placed upon the case of *Draper v. Ellis*, 12 Iowa, 316. That case is not in point, for the reason that the Code of 1851, under which that case was decided, in express terms required a statement of that kind in the petition. See section 1995 of that Code. Aside from this, the defect is not jurisdictional. It goes to the right of the plaintiff to recover in the particular case, and is such a defect as may be waived. See *Reed v. City of Muscatine*, 104 Iowa, 183; *Fulliam v. Drake*, 105 Iowa, *post*. The question was not presented to the lower court, and is here made for the first time. The petition follows the requirements of the statute (Code 1873, section 3225), and is sufficient. But, whether technically accurate or not, the defect was waived by failure to object at a proper time. See authorities cited above.

II. The petition recites that "the note is of no value excepting as a matter of evidence to the plaintiff, and for that purpose, and that only, is of the value of \$500." Defendant moved to strike out this allegation, claiming that it was surplusage and redundant matter, and not the actual or apparent value, as required by the statute to be alleged. The motion was properly overruled. See *Savery v. Hays*, 20 Iowa, 25.

III. Appellant moved that plaintiff be required to give an additional bond, for the reason that the property was worth at least five thousand, two hundred and thirteen dollars; and that the bond was for but one thousand dollars. While this motion was pending the note was brought into court, and deposited with the clerk, to abide the order and judgment of the court. The court thereupon overruled the

motion for an additional bond. We see no error in this ruling. But, whether there was or not, appellant
6 suffered no prejudice. The jury found plaintiff was entitled to the note because it was obtained through duress. He was therefore entitled to it whether the bond as originally given was sufficient or not. Had the bond not been given, plaintiff was entitled to have the right of possession decided, and, as the matter was determined in his favor, defendant has no reason to complain of the insufficiency of the bond.

IV. In an amendment to an amendment to the petition plaintiff alleged malicious threats on the part of the defendant and Snell in almost the exact language of section 3871 of the Code of 1873. Defendant moved to strike this amendment, because a mere repetition of prior pleading; and to require plaintiff to state whether he was in fact guilty of the offense of which defendant
7 threatened to accuse him. This motion was overruled, and, as we think, correctly. If the pleading was a mere repetition, the ruling was without
8 prejudice. If it was not then we must determine whether plaintiff should also have pleaded his innocence. An indictment, under the statute just referred to, is sufficient, although it does not allege
8 that the person so threatened was not guilty of the offense. *State v. Waite*, 101 Iowa, 377. If this be true, surely it is not necessary to plead the innocence of the one threatened in a civil suit bottomed upon duress. The law presumes that plaintiff was innocent of the offenses of which the defendant threatened to accuse him. This presumption of innocence supplies the alleged defect, even if it be found that one may not predicate duress upon a threat to prosecute him for an offense of which he is in fact guilty.

V. Defendant demurred to the petition as amended for the reason that there was no allegation therein that plaintiff was in fact, innocent of the charges. This demurrer was overruled. It is said in argument that to constitute duress *per minas* there must be a threat of unlawful imprisonment, and that the pleading must show plaintiff was not in fact guilty of the offenses of which defendant threatened to prosecute him. What we have said in the last preceding

9 division of this opinion fully answers this contention. It is also claimed that the petition, with its amendments, fails to show that the threats were immediate and without immediate means of prevention, and were such as would operate upon a person of reasonable firmness and courage, to cause him to do an act against his will. We think the pleadings sufficiently cover these points. It is alleged that defendant wantonly and maliciously made the threats for the purpose of extorting the note, and as a result of these threats plaintiff was put in fear, and compelled to execute the note without any consideration whatever.

VI. Over defendant's objection, plaintiff was permitted to show a demand for the note before bringing suit. It is argued that this evidence was irrelevant and immaterial. We are inclined to
10 think this is true, for, if the note was wrongfully obtained as alleged, no demand was necessary. But we fail to see how any possible prejudice resulted from the admission of the evidence. Some other errors are complained of in the reception and rejection of evidence which are not of sufficient importance to justify extended consideration. It is sufficient to say we discovered no error.

VII. Appellant claims that the court did not submit to the jury the question of consideration for the note, nor did it submit the question of ratification

pleaded by her. The question of ratification was submitted to the jury by the eighth instruction; and the court fully instructed as to what would constitute a consideration for the note. Moreover, any fault
11 in the instructions with reference to consideration, were cured by the special verdict of the jury, to the effect that the note was founded upon a valuable consideration. The ratification and confirmation pleaded by defendant relates to the letter written to defendant's daughter, and to certain alleged promises made to the bank to which the note was sent, and not to the retention of the alleged agreement for support. This alleged ratification was fully covered by the instructions, as we have heretofore stated.

VIII. The fourth instruction was as follows: "Duress in the making of a contract exists when the person making it is induced to make it by reason of being put in fear by means of threats of arresting him and unlawfully charging him with crime, when the threats and the fear induced thereby are such as would influence a man of reasonable courage and prudence,
12 and do deprive the party making the contract of the exercise of free will in making it. The threatened arrest, however, must be wrongful and unlawful, and apparently about to be enforced." Several objections are lodged against it, none of which are of sufficient importance to justify separate consideration. The instruction is an accurate definition of duress. See Bishop, Contracts, section 715; 6 Am. & Eng. Enc. Law, p. 64, and cases cited; *Baker v. Morton*, 12 Wall. 150.

IX. Complaint is made of the fifth instruction, upon the ground that no such issue as therein presented was made by the pleadings or covered by the evidence. We need not set them out. They relate to the crime for

which it is claimed defendant threatened to have plaintiff arrested, to the right of defendant or any other person to prosecute the same, and to the question as to whether defendant or any one for her made the alleged threats. They are not subject to the objections urged by counsel.

X. As bearing upon the question of ratification, the court gave the following instructions: "It is claimed by the defendant that the plaintiff, after the execution of said note, ratified the execution of same in the summer of 1895. A contract that is fraudulent by reason of same having been procured by means of duress may be ratified and confirmed by the maker thereof if his subsequent acts, with knowledge of all of the facts, are such as to fully indicate that he intends to then agree to and confirm said contract. If it appears from the evidence, by the letter written by plaintiff to his daughter concerning the note in question after same was executed, and by plaintiff's statements concerning the note and its payment by him to the officers of the Red Oak National Bank, that the plaintiff intended at the time of making said statements to assent to and confirm the contract made in said note, and pay the defendant, then such state of facts would amount to a ratification of said note by plaintiff, and would prevent plaintiff from subsequently claiming that said note was obtained from him by duress. But, to amount to a ratification of said note, the plaintiff's acts must have been such as to fully indicate an intention on his part at that time to assent to and confirm the contract contained in said note. If the plaintiff's purpose in writing to his daughter and in making statements to the officers of said bank was to get and keep the note within the jurisdiction of this court, so that he could replevin same from defendant, and not to confirm the contract contained in said note, then said acts and

statement would not, in any event, amount to a ratification of the note. If said note was obtained by duress, to overcome such duress the burden rests with the defendant to show that plaintiff ratified said note, by a preponderance of the evidence." This is challenged by appellant. She argues that ratification, estoppel, or waiver is a legal result, operating upon a certain state of facts, independent of all question of intent. This does not appear to be true. 'Waiver' has been defined to be the intentional relinquishment of a known right." There is no estoppel in the case, except as there may have been ratification. Now, ratification is the adoption or confirmation of a voidable act. It may be by express consent or by conduct inconsistent with any other hypothesis than that of approval. Intention to ratify, either explicit or presumed, is at the foundation of the doctrine of waiver or ratification. As applied to the facts of this case, we think the instruction was correct.

XI. Lastly, it is insisted that the verdict is not sustained by sufficient evidence. A careful examination of the record leads to the conclusion that there was a conflict on every material proposition, and that the jury was justified in returning a verdict for plaintiff. Other questions are disposed of by what has already been said. We have no occasion to decide whether duress may exist when one is threatened with arrest for a crime of which he is in fact guilty. The trial court instructed that the threat must have been of unlawful prosecution and arrest, and the whole charge assumes that, if plaintiff was guilty of the offenses of which defendant threatened to prosecute him, he could not recover. The only doubtful question, aside from the sufficiency of the evidence, is that of waiver. Defendant claims that, as part consideration for the note in controversy, she surrendered to plaintiff his agreement,

wherein he promised to give her one hundred dollars per year for support; that plaintiff accepted this agreement, and still retains it. This allegation appears in division 3 of the answer, and is apparently thrown in with other matters relating to ratification by letter and promises referred to in the eighth instruction. It is followed by a statement that by the writing of the letter and the making of the promises plaintiff was estopped from assailing the validity of the note. If it was the intention of the pleader to set forth the defense of ratification by retention of the contract, it is very inaccurately and obscurely done; and while the court might have instructed with reference to ratification by the retention of the agreement to support, and perhaps should have done so had request been made, yet the defense, if it be one, is stated in such an obscure manner that it was not error for the court to overlook it in its instructions. We may observe in passing, that there is a dispute in the record regarding the receipt of this contract, and it further appears that there is doubt about the validity thereof. As sustaining our conclusion on this branch of the case, see *Shroeder v. Webster*, 88 Iowa, 627, and *Carpenter v. Scott*, 86 Iowa, 563. We find no prejudicial error in the record.—AFFIRMED.

ROBERT J. MOYLE, Appellant, v. ISAAC SILBAUGH and
B. F. JAKES.

Fraud: RESCISSION. Where the owner of a patent right exhibited a model, and stated that the patent which he owns covers the machine exhibited, and, on the strength of the representation, sells the right to manufacture it, he may be enjoined from selling the notes given for that right, and the notes may be declared null and void, if an important device shown in the model is covered by another patent, and the purchaser cannot, for that reason, manufacture, under the right, the machine shown him.

Appeal from Greene District Court.—HON. Z. A. CHURCH,
Judge.

WEDNESDAY, MAY 18, 1898.

THE plaintiff purchased of the defendant Silbaugh all his right, title, and interest in a certain invention, with the right to use, manufacture, and sell in Minnesota, and, in consideration therefor, executed four notes of five hundred dollars each. He seeks in this action to enjoin the defendants from negotiating said notes, and to have them brought into court and canceled. Decree was entered for defendants, and plaintiff appeals.—*Reversed.*

Rose & Henderson for appellant.

Russell & Toliver and *A. U. Quint* for appellees.

LADD, J.—Letters patent for an alleged new and useful improvement in kitchen cabinets, known as the "Cabinet Queen," were issued to John B. Cline and Isaac Silbaugh on the nineteenth day of March, 1895. The patentees apportioned the United States between them; and, among other states, Pennsylvania, South Dakota, and Minnesota fell to the lot of Silbaugh. The latter is charged with inducing the plaintiff, by false representations, to execute his notes for two thousand dollars in compensation for an assignment of the territory included in Minnesota. Upon a careful examination of the evidence, we are convinced that the relief prayed should be granted. Since the patent issued, an improvement has been added. It seems that without this the crank to the sifter must be removed before the sieve can be taken out, and the flour reached. By the use of a movable piece in the front of the drawer or bin, and a change in fastening the shaft, flour can be more

conveniently obtained, and without unscrewing the crank. Cline testifies: "The improvement consists in placing this separable piece, attaching it to the sieve-frame front, and its extending down sufficiently to admit of the crank shaft passing through it, and a corresponding mutilation or opening of the drawer to admit of that being allowed to fit into it, that permits the lifting of the drawer of the sieve frame from the drawer without detaching the crank." As the model is not before us, we are unable to more fully describe the device. While the improvement does not appear to be very important, this may be said of the entire invention. That it was of such a character as to be valuable is established by the evidence. Cline so considered it, else he would not have applied for a patent. Silbaugh had been informed of this improvement, but not of Cline's action in the matter. In spite of this information he represented to Moyle that all parts of the Cabinet Queen were covered by letters patent. Whether he knew otherwise is not very material. *Wilcox v. University*, 32 Iowa, 368; *Mohler v. Carder*, 73 Iowa, 582. If he so falsely represented, and the purchase was induced thereby, this is sufficient. In *Meyers v. Funk*, 56 Iowa, 52, it is said: "We think it is not too stringent a rule to hold that one who purchases a patent right, which does not sell on its own merits, but requires the services of a traveling salesman, is entitled to the very invention and patent which he purchases, and nothing less." Even if the drawings and specifications were shown the plaintiff,—which he denies,—he had neither the time nor the opportunity to examine them. They were intricate and in detail, and required much attention to understand them. Besides Silbaugh knew he was making the purchase without such examination, and in reliance on his representations. See cases cited in 8 Am. & Eng. Enc. Law, 794. It may be that plaintiff

did not rely upon the protection of a patent as to any particular part. But it is clear that he would not have purchased it, had he not supposed the entire device or invention fully covered by the letters. We are the more content with our conclusion because of the hypocrisy and deceit practiced in making the sale. It seems that Silbaugh, B. F. Jaques, and Charles E. Dunnell deliberately arranged to "take in" Moyle, for whom Dunnell was working. Jaques induced Moyle to accompany him that he might get acquainted with Silbaugh and examine the invention, with a view of purchasing; and Dunnell went along. Ignorance of the way, even, was pretended, and inquiry made. Dunnell was to hang back, and finally agree to buy if Moyle would. When at Silbaugh's home, the model was examined; and, after considerable talk, Jaques proposed each buy a state, and related that at one time "he had sold Minnesota for ten thousand dollars, in a fumigating process," and this was a better thing. Dunnell inquired of Silbaugh what he would take for North and South Dakota and Minnesota, and the latter was finally argued down to seven thousand dollars. Jaques, who had been a near neighbor of the plaintiff, and in whom he reposed confidence, advised him the price was very low, but that he could get them cheaper. He finally suggested that plaintiff inquire of Silbaugh if he would take six thousand dollars, and make it even money. After substituting Pennsylvania for North Dakota, and granting the privilege of selling territory on a commission of fifty per cent., Silbaugh, with apparent reluctance, said he would take the price offered. Moyle remarked that, if he had any, he would want Minnesota; and, of course, the others desired the same state. Jaques proposed making each two thousand dollars and drawing therefor; and this was agreed to with the condition, on plaintiff's part, that the result should not be binding. Of course, the

plaintiff drew Minnesota. Silbaugh at once began preparing the assignments of territory, and insisted that, as Moyle had drawn what he wanted, he could not back out. Moyle executed notes for two thousand dollars, and in return received the right to use, manufacture and sell the Cabinet Queen throughout the state of Minnesota, but nowhere else. Similar assignments were made of Pennsylvania and South Dakota, and Jaques and Dunnell each executed notes for a like amount, though these were returned the following day. These sales and notes were sham, and mere pretenses to induce Moyle to make the purchase. If, as claimed, the defendants arranged to retain Pennsylvania and South Dakota, it was owing to an understanding and settlement of the next day. That these parties were acting as agents of Silbaugh, in dealing with Moyle, cannot be doubted, and as such, with his approval, were passing themselves as friends of plaintiff, upon whose judgment he could safely rely. The whole transaction deserves reprobation. It is all but incomprehensible that intelligent farmers, without facilities for manufacturing or selling, will persist in being swindled by peddlers of patent-right territory. The courts, however, must be astute in protecting the confiding and unwary, and in discovering just and tenable grounds for granting relief against all forms of fraud.—REVERSED.

JOHN McCARTHY, Appellant, v. E. M. HUMPHREY.

Landlord and Tenant: The lessor of a hotel may recover from the lessee an amount paid by the former at the latter's request for city water used by the latter, although at the time the lease was executed the hotel was piped for city water.

SAME. In the absence of an agreement, the landlord is not bound to pay for city water used by the tenant, although the house is piped therefor.

Appeal from Greene District Court.—HON. Z. A. CHURCH,
Judge.

WEDNESDAY, MAY 18, 1898.

THIS is an action to recover for a balance of rent due under a lease; for damages alleged to have been done to the leased property by defendant; for the cost of water supplied to said premises; and also for the use made by defendant of plaintiff's barn. The answer contains a general denial. It also sets up that the rent is fully paid; that defendant settled and paid for the use of said barn; that she never agreed to pay anything for the water supplied to the premises, and is not, therefore, liable on that account. Defendant also sets up a counterclaim for board and lodging furnished plaintiff in the sum of forty dollars and fifty cents. To the counterclaim there is a reply. The issues were submitted to a jury. There was a verdict for defendant. From the judgment entered thereon the plaintiff appeals.—*Reversed.*

Rose & Henderson for appellant.

Russell & Tolliver and *I. D. & R. G. Howard* for appellee.

WATERMAN, J.—A number of errors are assigned based upon the instructions and upon the rulings of the court on the admission of testimony. The judgment entry itself is attacked as having been recorded on Sunday. We need concern ourselves, however, only with the action of the court upon one of the issues tendered. It is very unlikely that any other of the matters complained of can arise on the new trial which we find must be had.

II. The building leased by defendant was a hotel, and it was piped for city water. The lease did not require the landlord to furnish water for the building. After defendant took possession, she used the city water, and it was charged against the property. Plaintiff introduced evidence tending to show that defendant requested him to pay the bills for the water, and promised if he would do so that she would repay him the amount; that he did on several occasions pay said bills; and that defendant has refused to reimburse him therefor. The amount so claimed to have been paid is one of the matters sued for, and it was taken from the jury by the trial court in these words: "Gentlemen of the jury, on the claim of plaintiff on what is herein and in this called the 'Water Claim,' you are instructed that same is not a proper claim against defendant, and you will not take the same into consideration. This is the claim of plaintiff for water claim of \$38.42, and must not be considered by you." To this action of the court exception was duly taken. The plaintiff had testified, as we have said, that he paid this amount for water at the request of defendant and on her express promise to repay him. We cannot understand on what theory this issue was taken from the jury. Certainly the lessor was under no more obligation to pay for the water used by his tenant because the house was piped for city water than he would have been to pay for gas used because there were fittings in the building. We think this matter should have gone to the jury. For the error in this ruling the judgment will be REVERSED.

THE ALPHA CHECKROWER COMPANY, Appellant, v. DAVID
BRADLEY & COMPANY.

Warranty: BREACH: *Damages.* Where machines are purchased of a manufacturer by a dealer, prospective profits are not a correct

106	537
118	578
118	741
105	587
123	588

measure of damages resulting from a breach of the warranty that the machines were well made; but, if the dealer has not made a seasonable tender of the machines, his damages are the difference between the value of the machines as warranted and their actual value, to which he may add any expense necessarily incurred because of the breach of warranty.

BREACH: Evidence. Evidence that corn cutters purchased by a general agent for the sale thereof were returned by purchasers from him because they would not do the work intended and that because of the defects therein such agent was unable to sell the same, is admissible as tending to show the breach of a warranty that they were well made and finished, although it is not conclusive as to such breach.

TENDER. A tender back of machines purchased under a warranty for 1-4-5 breach of such warranty must be made within a reasonable time.

Pleading. Therefore a counter claim setting up the purchase and receipt of certain machines under a warranty, the breach of the warranty, that relying on the contracts defendants incurred certain expenses, that by the breach he was deprived of a specific profit which he would have made on a resale of the machine, and that he is damaged in a specified amount, - does not state a cause of action.

IMPLIED WARRANTY. A warranty that corn cutters are fit for the purpose for which they are intended will be implied, if not expressed, where the sale is made under a warranty that they are "well made and finished."

Contract: SALE OR AGENCY. A contract by the manufacturer of corn cutters appointing a specified person as general western agent for the exclusive sale of the corn cutter and providing for his payment of a specified amount for each, subject to a discount for cash within thirty days, is a contract of sale and not of agency.

Appeal: TRIAL TO COURT: Motion for new trial. In a trial by the court the controlling question is the sufficiency of the evidence, and the judgment is a direct ruling upon that question. Hence, the sufficiency of the evidence may be reviewed on appeal, though no motion for new trial was made.

Appeal from Pottawattamie District Court.—HON. N. W. MACY, Judge.

WEDNESDAY, MAY 18, 1898.

ACTION to recover two thousand, five hundred dollars balance claimed to be due for one hundred and

ninety-six "Better Way corncutters," alleged to have been sold and delivered by the plaintiff to the defendant under a written contract set out in the petition. The defendants answered, admitting the execution of the written contract set out, the receipt of the corncutters, and denying every other allegation in the petition. For further defense, the defendant alleges that the corncutters were not well made nor well finished, and were of defective workmanship, and wholly unfit for the purpose of cutting corn. He further alleges

1 as follows: "That the machines which the defendant received of the plaintiff, and placed upon the market, were returned by purchasers, because the said machines would not do the work for which they were intended." "(6) That the defendant did all in its power to put said machines upon the market and sell the same, but, because of the imperfections and defects therein, defendant was wholly unable to sell the same, except as shown in statement hereto attached, marked 'Exhibit A.'". Defendant further alleges that he has on hand one hundred and twenty-one of the one hundred and ninety-six corncutters received from the plaintiff, and has so advised the plaintiff, "and has tendered same to the plaintiff, but plaintiff has refused to receive or accept the same." The defendant, by way of counterclaim, alleges the execution of said contract; that relying thereon, "and acting as the agent herein, as set forth in said contract," defendant did, at great cost and expense, proceed to dispose of said corncutters; that "they were not well made, nor of good material, nor properly finished, and failed absolutely to do the work for which they were made"; that "defendant was unable to sell but very few of the same, and a portion of those it did sell were returned to it by the purchasers, because said machines could not do the work represented"; that, under said contract, defendant was to

have a profit of five dollars; that, if said machines had been as represented, plaintiff would have been able to have sold the same, and made a profit thereon of nine hundred and eighty dollars, and that defendant has been damaged in the sum of one thousand dollars, for which judgment is asked. Plaintiff moved to strike the parts of the answer and the part of the counterclaim quoted above, which motion was overruled; whereupon plaintiff replied to the answer, and answered the counterclaim, denying that the corncutters were defective or wholly unfit for the purposes of corn cutting, also denying that the machines placed upon the market by defendant were returned by purchasers because they would not do the work for which they were intended, and alleging that said machines were doing the work for which they were intended; denying that defendant did all in its power to sell said machines, and were prevented by imperfections therein; denying that defendant has on hand the number of corncutters named in the answer, and denying that defendant has made a tender to plaintiff of said number, or of any number; further denying that defendant was the agent of plaintiff for the sale of said corncutters; denying that defendant, at great cost or expense, or otherwise, proceeded to dispose of the corncutters; denying that the corncutters were not well made, or that they failed to do the work for which they were intended; also denying that defendant was to have a profit of five dollars each, or that the contract fixes what the profit to said defendant should be; and denying that it has been damaged in any sum. Defendant, for amendment to its counterclaim, alleges that, under the contract said corncutters were to be shipped "nicely packed and bundled or crated in knocked-down condition, and ready for local shipment"; that they were shipped loose, improperly packed, and the parts unprotected. Plaintiff, in reply,

denied each and every allegation in said amendment. The case was tried to the court, and the court held that the burden was upon the defendant. Judgment was rendered that the plaintiff was entitled to have delivered to it at the warehouse of the defendant in the city of Council Bluffs, Iowa, the one hundred and twenty-one Better Way corncutters which defendant then had in its possession, and the defendant was directed to deliver the same at said warehouse upon demand of the plaintiff. Judgment was rendered in favor of the defendant against the plaintiff, for costs. Plaintiff appeals.—*Reversed*.

Mahoney & Smyth and *J. M. Galvin* for appellant.

Wright & Baldwin for appellee.

GIVEN, J.—I. Plaintiff brings this action against the defendant, as purchaser of the corncutters under this contract. Defendant contends that he received the corn cutters as agent for plaintiff, but insists that, as to this case, it is immaterial whether he received them an agent or purchaser. We think the questions discussed involve a construction of the contract in
2 this respect. The contract, after designating the plaintiff as party of the first part, and defendant as party of the second part, provides as follows: "That for one dollar in hand paid, and other valuable considerations, receipt of which is hereby acknowledged, said first party does hereby appoint said second party to be their general Western agents for the exclusive sale of the Better Way ear corncutter, Harry Willitts' patent, made by said first party, in all the territory worked by said second party, from their warehouse in Council Bluffs, Iowa, and described as follows: The four western tiers of counties in Iowa, from south to

north, that part of South Dakota south of a line parellel with the line between Iowa and Minnesota from east to west, eastern Wyoming, all of Colorado north of the south line of Arapahoe county, and all of Nebraska, for the period of one year from the date of this contract. Prices and terms shall be as follows: For above-named corncutters, nicely packed, and bundled or crated in knocked-down condition, ready for local shipment, delivered f. o. b. cars at warehouse of said second party in Council Bluffs, \$15 each, on four months' time, subject to a discount of 5 per cent. for cash within thirty days from receipt and checking of the goods. In consideration of the above-named price and terms, and for the further consideration that said first party agrees to send their representative, Mr. Graham, immediately into the territory above named, and take orders on bona fide sales of 50 cutters at \$20 each, delivered at warehouse of said second party in Council Bluffs, said second party does place an order for one car load of cutters, not to exceed 100; and further agrees to canvass said territory faithfully with their travelers, and to rush the sale of said cutters as hard as possible; and further agrees to distribute all the printed matter said first party will furnish, which shall be a liberal supply; and first party also agrees to furnish electrotypes of machines so that second party may get up circulars of their own. It is further agreed by first party to allow said second party to advertise said machine in the Council Bluffs and Omaha Implement World, a paper published in Omaha, to the amount of \$50, at their expense, and said second party will spend a like amount. It is further agreed by party of the first part to fill promptly all orders of said second party for as many machines as they are able to sell during the life of this contract, and said second party shall have the privilege of renewing this contract for a period of five additional years, at prices and terms

to be agreed upon at the close of the first year. Said first party warrant their machines to be well made and finished, and will replace free of charge any and all parts that fail from defective workmanship or material, and will carry a full line of repairs in the hands of said second party, and for all sold they shall settle for at the close of year, less a discount of 50 per cent. from their list prices. It is further agreed that the sales made by Mr. Graham of fifty machines shall be to parties of good financial standing, such as David Bradley & Co. will accept, and prices and terms shall be as favorable to second party as those named in Exhibit A, hereto attached."

This contract is with reference to a corncutter, "Willitts' patent, made by said first party." We may presume from this that the plaintiff had the sole right to sell this machine in the territory designated, and therefore conclude that the provision appointing defendant "general Western agents for the exclusive sale of the corncutter" is equivalent to an agreement that authority will not be given to any other than the defendant to sell in that territory. The prices and terms of payment preclude the idea of agency. Defendant is to pay fifteen dollars each on four months' time, subject to a discount of five per cent. for cash within thirty days from receipt and checking of the goods. We think this provision made the goods the property of the defendant immediately upon delivery. There is nothing in the contract that defendant was to sell in the name of the plaintiff, nor that the title to the corncutters should remain in the plaintiff, and the warranty indicates that an agency was not contemplated. In *Mack v. Tobacco Co.*, 48 Neb, 397 (67 N. W. Rep. 174), the agreement provided that the merchant was appointed agent of the manufacturer to sell its tobacco at such prices as it might

direct. The merchant was to be paid a certain commission on sales made at the prices fixed by the manufacturer, but, if he sold for less he was to have no commission. The merchant guaranteed the payment of all tobacco shipped him by the manufacturer. He was to execute and deliver his promissory note, due in sixty days, for all tobacco furnished. This was held not to be a contract of agency for the sale of the goods on commission, but a contract of sale, and that tobacco furnished the merchant under this contract upon his giving his notes therefor became his property. A number of cases are cited in that opinion which support our conclusion that this is not a contract of agency, and that defendant took the corncutters as purchaser.

II. By the contract, plaintiff warrants the machines "to be well made and finished," and the defense is that they were not as warranted, and were wholly unfit for the purpose of cutting corn.

3 Now, while it is true that the mere facts that machines were returned by purchasers because they would not do the work for which they were intended, and that, because of their defects, defendant was unable to sell the same, would not of themselves show a breach of the warranty, we think that such facts were admissible as having that tendency. Therefore, there was no error in overruling plaintiff's motion to strike from the answer. The same is true of the defendant's alleged inability to sell because of defects in the machines, as a ground for recovery under the counterclaim. We think plaintiff was not prejudiced by the overruling of the motion to strike.

III. Plaintiff's next contention is that the answer does not state a defense, nor the counterclaim a cause of action. The answer admits the receipt of the one hundred and ninety-six machines under the contract, and, as we have seen, they were received by defendant

as purchaser, at the agreed price of fifteen dollars for each machine. The defense is a breach of the warranty, and that defendant tendered back one hundred and twenty-one of the machines received. It is not
4 alleged that this tender was made within a reasonable time, nor is it stated when it was made. The authorities are uniform in holding that a tender must be made within a reasonable time, to be available. The answer evidently omits an essential element of an effective tender in failing to show that it was made within a reasonable time. Thus viewed, the only defense set up in the answer is a breach of the warranty, and therefore we think the court erred in rendering judgment for the return of the one hundred and twenty-one machines.

Plaintiff contends that a cause of action is not stated in the counterclaim. It shows the written contract containing the warranty; the receipt of the one hundred and ninety-six machines; the breach of the warranty; that, relying upon the contract, defendant incurred certain expenses; that by the breach he is deprived of a profit of five dollars each which he would have made in the sale of the machines; and that he is damaged one thousand dollars. This counterclaim is evidently based upon the assumption that defendant was acting as agent of the plaintiff, but, as we have

seen, he was a purchaser of the machines. As
5 a purchaser his remedy for a breach of the warranty, in the absence of a tender within a reasonable time, is the difference in the value of the machines as warranted and as they were, and expense necessarily incurred as a direct consequence of a breach of the warranty. The contract does not fix a profit of five dollars each as a measure of damages that should follow a breach of the warranty, and prospective profits are not a correct measure of defendant's damage. It does not

directly appear whether or not the court allowed anything on the counterclaim, but, as the pleadings show that plaintiff was entitled to recover some amount on account of the machines retained, and tendered back, we assume that the court must have allowed some amount on the counterclaim. Treating the defendant as a purchaser, we think the counterclaim does not state a cause of action, and that it was error to allow the defendant anything thereon.

IV. Plaintiff contends that there was no breach of the warranty, for that the warranty was that the machines were "well made and finished." The contract was made after inspection of a sample machine, and plaintiff insists that, if the machines furnished were made and finished as this sample was made and finished, there was no breach of the warranty, and insists that the evidence so shows. The warranty expressed is not that the cutters were made and finished as per sample,

but that they were well made and finished. If
6 it should be said that this is not a warranty that the cutters were fit for the purpose for which they were intended, we think that such a warranty must be implied. In *Blackmore v. Fairbanks, Morse & Co.*, 79 Iowa, 289, this court said as follows: "The rule in regard to an implied warranty of quality has been stated as follows: 'So far as an ascertained specific chattel, already existing, and which the buyer has inspected, is concerned, the rule of *caveat emptor* admits of no exception by implied warranty of quality. But, where a chattel is to be made or supplied to the order of the purchaser, there is an implied warranty that it is reasonably fit for the purpose for which it is ordinarily used, or that it is fit for the special purpose intended by the buyer, if that purpose be communicated to the vendor when the order is given.' 2 Benjamin, Sales, section 966. See, also, *King v. Gottschalk*, 21

Iowa, 513. In this case, plaintiff had not inspected the property ordered, and had no opportunity to do so, when the order was given. On the other hand, defendant knew the use for which the property was intended. Therefore, unless excluded by the terms of the order, there was an implied warranty that the property was fit for the desired use, and that it was in merchantable condition. Appellant contends that the order, in effect, contains an express warranty that the property shall be in good order; hence that implied warranties must be excluded. It is true that, as a general rule, no warranty will be implied where the parties have expressed in words the warranty by which they mean to be bound (2 Benjamin, Sales, section 1002); but the rule does not extend to the exclusion of warranties implied by law, where they are not excluded by the terms of the contract. Thus, an express warranty of title does not exclude an implied warranty of quality,"—citing cases. It is further said: "A warranty will not be implied in conflict with the expressed terms of the agreement; but there is no conflict of that kind in this case." The same is true of the case at bar, and we think that it should be implied if it is not expressed, that the cutters were reasonably fit for the purpose for which they were intended.

Counsel discuss at some length the competency and sufficiency of the evidence to sustain the judgment, especially upon the question of defendant's damages.

Defendant insists that, as there was no motion
7 for a new trial, the question of the sufficiency of the evidence was not brought to the attention of the trial court, and therefore cannot be reviewed on appeal. The trial being to the court, the controlling question was the sufficiency of the evidence, and in the judgment we have a direct ruling of the court upon that question. Had the trial been to a jury, it would have

been otherwise. What we have said indicates our views upon the measure of damages and the competency of testimony to support the claim, and as, for reasons already stated, a re-trial may follow, we will not discuss the evidence nor pass upon its sufficiency. As we view the contract and the case under it, the defendant is sued as purchaser of the machines, and as purchaser defends, upon the ground of a breach of the warranty, and for that breach asks damages. For the errors pointed out, the judgment of the district court is REVERSED.

THE BENTON COUNTY SAVINGS BANK OF NORWAY V. BODDICKER, *et al.*

Bonds: WRONGFUL DELIVERY: *Notice to obligee.* Where a bond
 1 was delivered by the principal in violation of a condition on which
 2 it was signed by the sureties, the obligee may nevertheless recover
 3 thereon, if he shows that he was ignorant of the conditions on
 4 which the sureties signed, and that he took the bond in good faith,
 and for sufficient consideration.

Daniels v. Gower, 54 Iowa, 319, *overruled*.

SAME. It is error to charge that the obligee of a bond may recover thereon unless he has *express* notice that the bond is being delivered in violation of a condition upon which a surety signed it. It was sufficient notice if obligee had knowledge of such facts as would have caused a person of reasonable prudence to investigate and discover that the delivery was not authorized.

CONSTRUCTION OF: Future debts. A bond recited that its purpose
 1 was to fully indemnify the obligee from the failure of the principal
 6 pals "to pay their indebtedness now owing (or which may be contracted hereafter)." *Held*, that the bond besides renewals of existing indebtedness, covered future indebtedness, notwithstanding a recital that the condition of the bond was that the principals "shall pay the full amount of their indebtedness."

Same. A bond in the sum of five thousand dollars given to secure
 1-6 future indebtedness, does not limit the indebtedness the principal
 7-8 may incur, but only the amount which the bond should secure.

Consideration. Where a bond was given to secure future as well as present indebtedness, and new debts were afterwards contracted,
 7 and old ones extended, there is a consideration to support it,

105	548
1107	399
105	548
127	386
105	548
128	43
105	548
136	396
136	697
105	548
143	440
144	209

although, when it was given, the debts amounted to more than the amount of the bond.

Savings Banks: LOANS: Construction of statute. Acts, Fifteenth

9 General Assembly, chapter 60, section 18, provides that the total liabilities to a savings bank for money borrowed of it shall at no time exceed twenty per cent of the capital stock actually paid in.

Held,

- a This provision is simply a rule to govern the savings bank and it does not make a larger loan void.
- b A bond which agrees to indemnify such bank against the failure of a debtor to pay present and future *indebtedness*, is not within the statute. *Indebtedness* may include more than *borrowed money*.
- c Where the debt secured by bond may be enforced against the debtor and the bond was not given for an illegal purpose, the bond may be enforced.

Principal and Surety: FRAUD OF OBLIGEE. Where the surety inquires of the creditor respecting the principal for information

- 5 the creditor may properly give, and the creditor withholds the same without sufficient cause, or misleads the surety, the creditor should suffer the loss thereby occasioned.

Appeal from Benton District Court.—HON. O. CASWELL, Judge.

THURSDAY, MAY 19, 1898.

ACTION at law on a bond given to secure the payment of money. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendants appeal.—*Reversed.*

Heins & Heins for appellants.

Tom. H. Milner for appellee.

ROBINSON, J.—In January, 1881, the plaintiff was organized as a corporation by virtue of chapter 60 of the Acts of the Fifteenth General Assembly, for the purpose of transacting business as a savings bank at Norway, in Benton county. Its capital stock, at first but ten thousand dollars, was, in the year 1887, increased to fifteen thousand dollars. The firm of G. A. Miller &

Sons was engaged at Norway in selling coal, lumber, and agricultural implements, and borrowed money of the plaintiff. In the first part of the year 1891 the firm was indebted to the plaintiff to the amount of about six thousand dollars, and upon the demand of the plaintiff executed and delivered to it the instrument in suit, of

which the following is a copy: "Know all
1 men by these presents that we, G. A. Miller
& Sons, as principals and Joseph Boddicker
and V. A. Thoman, as sureties, of Benton county,
Iowa, are held and firmly bound unto the Benton
County Savings Bank of Norway, Benton county,
Iowa, in the sum of five thousand (\$5,000) dol-
lars, to be paid to the said Benton County Savings Bank
or its assigns; to the payment of which we bind our-
selves, and each of us, our heirs and legal representa-
tives, firmly by these presents. It is the intention and
purpose of this instrument or obligation to fully pro-
tect and indemnify the said Benton County Savings
Bank or its assigns against any and all losses by reason
of the failure of the said G. A. Miller & Sons to pay their
indebtedness now owing (or which may be contracted
hereafter) to the said Benton County Savings Bank.
The condition of the above obligation is such that, if the
said G. A. Miller & Sons shall pay the full amount of
their indebtedness to the said Benton County Savings
Bank, then this obligation to be void and of none effect;
otherwise to remain in full force and virtue. G. A.
Miller & Sons. Joseph Boddicker. V. A. Thoman."
On the thirty-first day of January, 1896, the plaintiff
commenced this action against the firm of G. A. Miller
& Co. and its members to recover the amount due on
certain promissory notes, and against the sureties to
recover the amount of the bond. The action was aided
by attachment which was issued against the property of
the firm and its members. In April, 1896, judgment

was rendered against all the defendants excepting the sureties on the bond, for the sum of fourteen thousand, six hundred and twenty dollars and fifty-five cents, an attorney's fee, and costs, and a special execution was ordered against certain town lots. Thereafter, by order of the court, a separate petition setting out the claims of the plaintiff upon the bond was filed, and to that the sureties Boddicker and Thoman filed an answer. The verdict and judgment against them were for the full amount of the bond.

I. The defendants claim that each of them signed the bond upon the express condition that before it should be delivered and take effect it should also be signed by three other men of good financial responsibility; also that Boddicker signed the bond on that condition, and notified the plaintiff of that fact before the bond was delivered, and that Thoman signed after Bod-

dicker did, and relying upon his signature. There
2 was evidence which tended to support these claims. The court charged the jury that the burden was on the defendants to show that the plaintiff had knowledge or notice of the condition on which the bond was signed, if it was signed on the condition alleged, before it was delivered, or before any credits had been extended or benefits conferred by virtue thereof; and of that portion of the charge the appellants complain. The answer alleges that the plaintiff had the knowledge or notice specified before the bond was delivered, but the appellants insist that upon proof of the fact that the bond was executed on the condition stated a presumption that the plaintiff took the bond with knowledge of the condition was created, and that the burden of rebutting that presumption, and showing that the bond was taken in good faith, was upon the plaintiff. It is a rule of general application that the holder of negotiable paper which is payable to bearer or

is endorsed in blank is presumed to be its *bona fide* owner, but that, when fraud or other illegality in the inception of the paper is shown, the burden is shifted to the holder to show that he acquired and holds it in good faith. *Bank v. Barber*, 56 Iowa, 559, and authorities therein cited; *Bank of Montrose v. Anderson Bros. Min. & Ry. Co.*, 65 Iowa, 692, 701; *Lane v. Krekle*, 22 Iowa, 399; *Bank v. Schloesser*, 101 Iowa, 571; *Bank v. Holan*, 63 Minn. 525 (65 N. W. Rep. 952); *Bank v. Richter*, 55 Minn. 362 (57 N. W. Rep. 61); 1 Am. & Eng. Enc. Law (2d ed.), 369; Tiedeman Commercial Paper, section 303. And when an alteration in an indorser's contract is shown the burden is on the holder of the note to show the sufficiency of the indorsement. *Robinson v. Reed*, 46 Iowa, 219. The rule of these cases applies, notwithstanding the fact that in actions by persons not payees of such paper it is necessary to plead in defense that the plaintiffs are not good-faith holders of the paper in suit. *Lane v. Krekle*, *supra*; *Sillyman v. King*, 36 Iowa, 207, 214. These rules have been applied to purchasers of real property whose titles were assailed. *Rush v. Mitchell*, 71 Iowa, 333; *Gardner v. Early*, 72 Iowa, 518; *Merrill v. Tobin*, 82 Iowa, 529; *Sillyman v. King*, *supra*. In this case there has not been any transfer of the instrument alleged to have been wrongfully delivered, and it is not a negotiable instrument. Therefore, the rules which protect the *bona fide* owners of negotiable instruments are not in all respects applicable. We cannot, however, assent to the claim of the defendants that, if the bond in suit was delivered in violation of an agreement to the effect that it should not be delivered until three additional sureties should sign it, no recovery can be had thereon, even though the plaintiff took it without knowledge or notice of the agreement. The case of *Johnston v. Cole*, 102 Iowa, 109, involved the validity of a contractor's bond, on which

recovery was sought against a surety named Cole. He pleaded as a defense that the bond was not to be delivered unless it should be signed by another surety, and the jury found specially that he did not deliver the bond nor authorize its delivery without the signature of another surety. We held, under the issues tendered and the special finding, that the invalidity of the bond had been established, and called attention to the fact that the issues did not bring in question the legal effect of the delivery made; and that the answer pleaded an affirmative defense, the sufficiency of which was not in any manner questioned. Whether the *bona fide* holder of such a bond might, in any event, be entitled to recover upon it as against the surety who had not authorized its delivery, and upon whom rested the burden of proof as to the good faith of the holder, were questions not decided in that case. In *Daniels v. Gower*, 54 Iowa, 319, a recovery was sought against the sureties on a non-negotiable promissory note. Three of the sureties signed the note when it was in the hands of one Stoller, with the agreement that it should not be delivered unless the signature of one Blajok should be obtained. It was held that if Stoller was not the agent of the plaintiff, and the note was delivered without the knowledge and consent of the three sureties, in violation of the condition upon which it had been placed in the hands of Stoller, the sureties would not be liable. The correctness of that decision was questioned in *Taylor County v. King*, 73 Iowa, 153, and the fact was pointed out that it rested in part upon the supposed authority of *Pepper v. State*, 22 Ind. 399, which has been overruled in *State v. Pepper*, 31 Ind. 76, and in part upon the case of *Ayres v. Milroy*, 53 Mo. 516, which was examined and questioned, if not distinguished, in *State v. Potter*, 63 Mo. 212. The case of *People v. Bostwick*, 32 N. Y. 445, tends to sustain the doctrine of *Daniels v. Gower*, but was questioned in

Russell v. Freer, 56 N. Y. 67, although it was cited in *Whitford v. Laidler*, 94 N. Y. 145. In some cases a distinction has been suggested between official bonds and other non-negotiable instruments, based upon grounds of public policy. *Carroll County v. Ruggles*, 69 Iowa, 269; *Taylor County v. King*, 73 Iowa, 153. But, although there are a few authorities which support the rule of *Daniels v. Gower*, the greater number do not. See *Butler v. U. S.*, 21 Wall. 272; *Dair v. Same*, 16 Wall. 1; *White v. Duggan*, 140 Mass. 18 (2 N. E. Rep. 110); *Ordinary v. Thatcher*, 41 N. J. Law, 403; *Quick v. Milligan*, 108 Ind. 419 (9 N. E. Rep. 392); *Russell v. Freer*, 56 N. Y. 67; *State v. Peck*, 53 Me. 284; *State v. Pepper*, 31 Ind. 76; *McCormick v. Bay City*, 23 Mich. 457; *Millett v. Parker*, 2 Metc. (Ky.), 608; *State v. Potter*, 63 Mo. 212, and cases therein cited; *Cutler v. Roberts*, 7 Neb. 4; *Nash v. Fugate*, 32 Grat. 595; *Jordan v. Jordan*, 10 Lea, 124; *Tidball v. Halley*, 48 Cal. 613; *City of Chicago v. Gage*, 95 Ill. 613. The ground upon which some of these decisions are based is that, where sureties have placed in the hands of their principal an instrument which purports to be valid and complete, they are estopped to assert, as against an innocent holder for value, that they did not execute it. In this case, if the testimony for the plaintiff be credible, the defendants executed what purported to be a valid bond, complete excepting that the names of the sureties were not inserted, and intrusted it to the principal. He delivered it wrongfully, it is said, but the plaintiff had no knowledge of that fact, nor of any circumstances which should have caused it to inquire as to the condition on which the bond was signed. We do not think that, in the absence of such knowledge, the plaintiff refrained at its peril from making inquiry as to the signing of the bond. It is a rule of general application that when one of two inno-

cent parties must suffer loss it should fall upon the one whose acts caused it. *Quick v. Milligan, supra.* We reach the conclusion that the doctrine of *Daniels v. Gower*, which we have considered, is contrary to reason and the weight of authority, and so far as the case announces that doctrine it is overruled. If it be shown that the bond was delivered by the principal in violation of the condition on which it was signed by the sureties, nevertheless the plaintiff may recover if it show that it received the bond in good faith, for a sufficient consideration, without knowledge or notice of the condition upon which the defendants signed it. ✓

II. The defendants state that, being ignorant of the financial standing of G. A. Miller & Sons, they applied to the plaintiff, a short time before this action was commenced, for information, and were then assured by the plaintiff that the firm was solvent, and in good financial condition; that the plaintiff knew that the statements were false; that the defendants believed them to be true, and relied upon them, and in consequence refrained from taking measures to secure themselves which they would have taken but for the false representations made as stated. In view of the

5 fact that what evidence will be given on another trial of this case is uncertain, we content ourselves with saying on this branch of the case that as the contract of suretyship is, as a rule, for the benefit of the creditor, he is, in dealing with the surety, to observe the utmost good faith, and if he fail to do so, without a sufficient excuse for his neglect, the surety will be discharged to the extent to which he suffers by reason of the lack of good faith on the part of the creditor. If the surety applies to the creditor for information respecting the principal which the creditor has, and may properly give, but which he withholds without sufficient cause, or if he knowingly give false information, he, and not

the surety should suffer the loss occasioned by the wrong. See *Bank of Monroe v. Anderson Bros. Min. & Ry. Co.*, 65 Iowa, 692; *Rowley v. Jewett*, 56 Iowa, 492; *Auchampaugh v. Schmidt*, 77 Iowa, 13; *Wolf v. Madden*, 82 Iowa, 114; *Harris v. Brooks*, 21 Pick. 195; *Brandt on Suretyship*, 611.

II. The evidence tended to show that the time of paying some of the indebtedness of G. A. Miller & Sons which existed when the bond in suit was given was afterwards extended, and that new indebtedness was thereafter contracted; and it is insisted that the bond does not cover either class of indebtedness. The bond, in terms, covers the indebtedness of the firm which it owed to the plaintiff at the time the bond was given, or which should be thereafter contracted. It is true, the third paragraph of the bond recited that the condition of the bond is that the firm "shall pay the full amount of their indebtedness" to the plaintiff, and that paragraph, taken alone, might well be said to refer only to indebtedness existing when the bond was given; but all the provisions of the bond must be construed together, and when that is done it is clear that the bond was intended to secure the payment of the indebtedness of the firm to the plaintiff which existed at the time the bond was given, and also that which should be created by contract thereafter. The provisions were sufficiently broad to include renewals of existing debts, as well as those which should otherwise accrue, for a continuance of the business of the firm was evidently contemplated, and contracts for the extension of existing debts were as much within the scope and purpose of the bond as were those which should be thereafter created. We do not think that the case of *Crapo v. Brown*, 40 Iowa, 487, nor other authorities cited by the appellants, are in conflict with the conclusion we reach, as

each was made to depend upon the terms of the obligation construed, and none were like the bond in suit.

IV. It is urged that there was no consideration for the bond, but without sufficient reason. Although G. A. Miller & Sons were owing more than the
7 amount of the bond when it was given, yet it applied to future as well as to existing indebtedness, and the evidence shows that new debts were contracted after the bond was given. It is also said
8 that the debts the firm was permitted to incur were largely in excess of the amount permitted by the bond; but that did not purport to limit the amount of indebtedness the principal might incur, but only the amount which the bond should secure.

V. Section 18 of chapter 60 of the Acts of the Fifteenth General Assembly provides that "the total liabilities to any association of any person, or of any company, corporation, or firm, for money borrowed, including in the liabilities a company or firm, the liabilities of the several members thereof, shall at no time exceed twenty per cent. of the capital stock actually paid in; provided: that the discount of *bona fide* bills of exchange drawn against actually existing value and the discount of commercial or business paper actually owned by the person or persons, corporation or firm negotiating the same shall not be considered
9 money borrowed." As the capital stock of the plaintiff was but fifteen thousand dollars, the
amount of the bond was two thousand dollars in excess of the sum which the plaintiff was authorized to lend to the firm, and the amount of its debts to the plaintiff when this action was commenced was nearly five times that which it was authorized to borrow of the plaintiff. It is argued that the firm and the plaintiff violated the law in creating the debt, and that the sureties are thereby discharged. It is true that every

contract must be construed with respect to the law applicable to it, and that contracts in violation of law are void; but it does not appear that the bond was designed to accomplish or to promote an illegal purpose. It was not restricted to indebtedness which should have been or should be thereafter incurred for borrowed money, and the prohibition of the statute is against liabilities for money borrowed. It will be noticed that the statute does not make a loan of money in excess of the per centum named void, and the general rule applicable to loans of that character is that they are not void, the prohibition of the statute being intended as a rule for the government of the bank. *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640; *Bank v. Perry*, 72 Iowa, 15; *Pangborn v. Westlake*, 36 Iowa, 546; *Bank v. Slemmons*, 34 Ohio St. 142; *Bank v. Savery*, 82 N. Y. 291; *Duncombe v. Railroad Co.*, 84 N. Y., 190; *O'Hare v. Bank*, 77 Pa. St. 96; *Bank v. Fall*, 71 Me. 49; 27 Am. & Eng. Enc. Law, 380, 381. Since it does not appear that the bond was given for an illegal purpose, and the plaintiff can enforce as against G. A. Miller & Sons the full amount of their debts, we are of the opinion that the defendants may be liable in this action for the full amount of the bond in suit.

VI. The twelfth paragraph of the charge given by the court in effect authorized the jury to find for the plaintiff, even though the bond was delivered in violation of the condition on which it was signed by the defendants, if the plaintiff did not have "express notice" that its delivery was unauthorized. We think
10 that in giving that portion of the charge the court erred. If the bond was delivered in violation of the condition on which the defendants signed it, knowledge of such facts as would have caused a person of reasonable prudence to investigate and discover that the delivery was not authorized would have been sufficient

to charge the plaintiff with notice that the bond was illegal. The conclusions we have expressed dispose of the controlling questions presented for our consideration and of those which are likely to arise on another trial. For the errors which we have pointed out, the judgment of the district court is REVERSED.

S. F. FRY V. WARFIELD, HOWELL, WATT COMPANY, *et al.*,
Appellants.

105	559
114	352

Purchaser at Execution Sale: NOTICE OF MORTGAGE WITH WRONG DESCRIPTION. A debtor mortgaged his farm and shortly afterwards defendant commenced an action, and bought it in at an execution sale resulting. The mortgage was recorded, but by a misdescription located the land in range 30, instead of 36, the correct number. Defendant before sale, was told that the bank which plaintiff represents had a mortgage on debtor's farm in A. county. There was no range 30 in A. county and debtor had only the one farm in such county, where the mortgage was recorded. *Held*, sufficient to put the purchaser on inquiry, and charge him with notice that the mortgage was senior to his lien.

Execution Sale: REDEMPTION: *Affidavit.* Code, 1873, section 3117, relating to redemptions by creditors from execution sale after nine months, requires that "such redemptioners" shall enter certain credits on the record. Section 3118 requires that the person "so redeeming" shall file an affidavit setting forth the amount due and unpaid on his own claim. *Held* that, since sections 3101-3117 relate in their former portion to redemptions before nine months from execution sale, and in their latter part relate to redemptions subsequent thereto, the words "such redemptioners" and "so redeeming" must apply to the latter, and intend that affidavit shall be necessary only when redemption is made after nine months.

Appeal from Audubon District Court.—HON. W. R.
GREEN, Judge.

THURSDAY, MAY 19, 1898.

ACTION for the foreclosure of a mortgage on real estate, and to adjudge defendants' interest in the land

junior to the mortgage lien. There was a decree for plaintiff, and the defendants appealed.—*Affirmed.*

C. C. & C. L. Nourse and *Theo. F. Meyers* for appellants.

B. I. Salinger for appellee.

GRANGER, J.—The following is the statement of the facts found by the district court, and of the propositions for consideration: “It seems that one Sutter, who is a partner in the firm of Lebeck & Sutter, was the
1 owner of the east half of the southwest quarter, and the west half of the southeast quarter of section sixteen (16), township eighty-one (81), range thirty-six (36) west of the 5th P. M., in Audubon county, Iowa, upon which were mortgages made by Sutter to Carter, Enders, and the Citizens’ Savings & Trust Company. The firm of Lebeck & Sutter became involved, and among other parties was indebted to the defendant the Warfield-Howell-Watt Company, who commenced an action against Lebeck & Sutter, levied upon this property on the 25th day of June, 1894, and under a special execution upon said judgment sold the same, bought it in at sheriff’s sale, and took a sheriff’s certificate therefor. Afterwards, on the 17th day of December, 1895, no redemption having been made therefrom, the Warfield-Howell-Watt Company obtained a sheriff’s deed under said sale. In the meantime the prior mortgages had been foreclosed and the property sold thereunder, on the 10th day of April, 1895. After the defendant the Warfield-Howell-Watt Company had obtained the deed under its attachment suit, and on the 18th day of December, 1895, they purchased the certificate of sale which had been issued under the foreclosure of the mortgages, and the plaintiff claims to have made redemption therefrom. It appears also that one C. D. Dewing held a

mortgage, intended to cover the same property, junior to the mortgages above referred to, made by Sutter on the 9th day of April, 1894, and filed for record in Audubon county on the 13th day of the same month. This mortgage stated that the land conveyed therein was in Audubon county, Iowa, and the property of Sutter, but by mistake in the description given in the instrument the number of the range was stated as thirty (30), instead of thirty-six (36), as it should have been. There is no doubt under the evidence that Sutter never owned any land in Audubon county, except as above described, and that he never owned any land in range thirty (30), nor is there any question but that the parties intended that the mortgage should be made and delivered upon the above-described land in range thirty-six (36), and for a long time supposed that this had been done. This mortgage passed to the State Bank at Manning, and the plaintiff, Fry, is now bringing this suit to foreclose the same for the bank, asking that the same be corrected, and that the interest of the Warfield-Howell-Watt Company in the said premises be declared junior to the interest held by him. In determining whether plaintiff has now a superior lien, it will be necessary to consider: (1) Whether the mortgage made by Sutter to Dewing is senior to the sheriff's deed obtained under the attachment proceedings; (2) whether plaintiff made a valid redemption from the foreclosure of the prior mortgages."

I. The grounds upon which it is urged that the mortgage is senior to the sheriff's deed are two: First, that the recorded mortgage, notwithstanding the defect as to the range, imparted constructive notice; and, second that the Warfield-Howell-Watt Company had actual notice of the mortgage. Our conclusion upon the second proposition makes it unnecessary to consider the first. Appellant concedes that on the question of actual notice the evidence is in sharp conflict. That defendant

had notice to the extent of being told that the bank had a mortgage on the farm owned by Sutter in Audubon county is reasonably certain. Sutter had but the one farm in Audubon county, and we think the information sufficient to put defendant on inquiry. If he had such information, he had actual notice. *Plow Co. v. Braden*, 71 Iowa, 141. As the record of the mortgage showed the land to be in Audubon county, and gave a range not including such county, if the record is of any significance on the question of fact, it would strengthen the conclusion.

II. The redemption made by plaintiff from the prior mortgages was within nine months from the date of the sale, and no affidavit was filed as required by section 3118 of the Code of 1873, as follows: "The
2 mode of making redemption is by paying the money into the clerk's office for the use of the person thereto entitled. The person so redeeming, if not defendant in execution must also file his affidavit or that of his agent or attorney, stating as nearly as practicable the amount still unpaid and due on his own claim." That such an affidavit must be filed where redemption is made after the nine months from the date of sale is not questioned, but the parties are in contention as to such a requirement in case of redemption made before that time. In *Goode v. Cummings*, 35 Iowa, 67, the precise question is considered, and a conclusion stated that it is not required in cases of redemption prior to the expiration of the nine months. The case cites, in support of the views expressed, *Wilson v. Conklin*, 22 Iowa, 452. It is thought by appellants that neither case involved the question so as to be an authority, and the case of *West v. Fitzgerald*, 72 Iowa, 306, is referred to and quoted from, and because of some language there used it is claimed that the question is an open one for us to determine. We think the question was fairly involved

in *Goode v. Cummings*, and we may add that we regard the conclusion therein stated as the correct one. Taking the sections on the subject of redemption from 3101 to the one in question, 3118, and it is readily seen that redemptions are of different kinds, and the distinction is marked as to those of creditors before and after the expiration of the nine months. After section 3113, the provisions are exceptions to the general ones stated. Section 3115 provides for an entry on the sale book, and the amount the last redemptioner before the expiration of the nine months is willing to credit on his claim. There is no such specific requirement as to other redemptions made before the expiration of the nine months. Section 3116 provides for a redemption by paying the legal disbursements of the last holder, added to the amount on the sale book. Section 3119 provides: "such redemptioner" must also credit the full amount of his claim unless he makes a like entry on the sale book, etc. Then comes what seems to us to be the decisive language: "The person so redeeming * * * must also file affidavit * * * stating as nearly as practicable the amount still unpaid and due on his own claim." The words "such redemptioner" and "the person so redeeming" must be intended to limit the requirement as to the filing of the affidavit to the class or kind of redemptioners last spoken of, or provided for in the act, the distinction being as to the time of making the redemption. The most that can be said of *West v. Fitzgerald*, *supra*, is that it holds that what was said in *Goode v. Cummings* was as to the manner of redemption, instead of a right of redemption. It is the manner of redemption that we are now dealing with, so that there is nothing in the *West-Fitzgerald Case* to detract from the other case as authority. We need add nothing more to what is said in *Goode v. Cummings*. A motion to strike appellee's additional abstracts from the files is sustained. The judgment will stand AFFIRMED.

WILLIAM DORRIS, Executor, with Will Annexed of the
Estate of JOHN F. MILLER, Deceased, Appellant, v.
W. M. MILLER.

Executors: COUNSEL FEES. Counsel fees of an executor in setting aside and revoking ancillary administration erroneously granted

- 1 to defendant in another state cannot be recovered from such
- 2 defendant where no malice on defendant's part is pleaded or
- 5 proven; and even conceding that defendant had no right to apply for administration, and that his conduct was tortious, the fees are not recoverable. The motive with which a person exercises a legal right is immaterial.

SAME: *Fraud.* Counsel fees paid out by one in an unsuccessful

- 1 attempt to retain ancillary administration of an estate cannot be
- 5 recovered from the estate, especially where such person made false and untruthful statements in his petition for such administration.

SETTLEMENT: *Construction of statute.* One appointed as ancillary administrator, in his endeavor to retain such position, was allowed by the probate court counsel fees, under the mistaken idea that he was entitled to represent the estate, and such order has not been set aside or vacated. On appeal, his appointment was reversed. There was no necessity of any ancillary administration,

- 6 of which he had knowledge, and his acts in petitioning therefor lacked but little, if anything, of fraud. *Held* that, in an action by the estate against him, he was liable for the amount of such fees, under Code, 1873, section 2474, providing that mistakes in settlements may be corrected at any time before the discharge of the executor; and Code, 1873, section 2475, limiting the time to three months within which applications may be made to open up accounts of executors and administrators settled in the absence of parties in interest, has no application to mistakes or fraud in the settlement of an administrator's intermediate account.

INTEREST ON FUNDS. An ancillary administrator is not chargeable with interest on the funds held by him where he retained them for

- 8 less than a year and was not asked to make distribution to the legatees and made no profit therefrom except what incidental profit may have been derived from depositing the funds subject to check in the bank of which he was president.

TAXATION. The money in the hands of an executor or administrator is not exempt from taxation for the reason that it is not being

- 4 loaned or invested, especially where taxes are not paid on same at the principal place of administration.

105	564
110	611
105	564
113	358
113	502
105	564
116	450
105	564
124	488
105	564
127	670
105	564
134	170
105	564
140	608

Appeal from Black Hawk District Court.—HON. J. J. TOLERTON, Judge.

THURSDAY, MAY 19, 1898.

Suit in equity for an accounting between plaintiff, who is executor of the will of John F. Miller, deceased, and defendant, who at one time acted as administrator of the estate of said John F. Miller, under appointment from the district court of Black Hawk county. The trial court gave plaintiff judgment for two thousand, fifty-six dollars and sixty cents, and both parties appeal. As plaintiff first perfected his appeal, he will be called the "appellant."—*Affirmed.*

N. M. Hubbard and *O. C. Miller* for appellant.

F. C. Platt and *Boies & Boies* for appellee.

DEEMER, C. J.—John F. Miller died, testate, in the state of Pennsylvania, August 24, 1893. Defendant, W. M. Miller, is his nephew. About the year 1874, John F. Miller placed nineteen thousand dollars in money in the hands of his nephew, to be loaned in the states of Iowa and Kansas. At the time of his death, this fund amounted to about thirty-six thousand dollars. The uncle also held a note of about five thousand dollars against his nephew. The John F. Miller estate was appraised at seventy thousand dollars, and the will devised the same to the nephews and nieces, and sisters and stepsisters of the deceased. Plaintiff was named as the executor of the will, and a bequest was made to him in the trust for certain uses. Shortly after the death of John F. Miller, plaintiff wrote defendant a letter notifying him of his uncle's death, informing him that he (plaintiff) had been

named as executor, and requesting defendant to send him all the securities belonging to the estate. Instead of complying with the request, 1 defendant petitioned the district court of Black Hawk county for appointment as administrator of the estate of his deceased uncle, stating that the validity of the will had been denied by the heirs, and that objections to the probate thereof in the state of Pennsylvania had been and would be urged. He also stated that deceased had personal property in this state to the amount of about thirty-six thousand dollars, and that he was owing an unknown amount to various residents and corporations of this state. On the ninth of September, 1893, defendant was appointed administrator in this state, and he immediately wrote the executor that he had been so appointed, and refused to turn over the assets in his possession. Thereupon plaintiff applied to the Black Hawk district court for auxiliary letters and the probate of the will in this state. This petition was granted, and plaintiff was appointed executor with will annexed on September 29, 1893. On the third of October, 1893, plaintiff filed a motion to set aside and revoke the letters of administration issued to the defendant, and within a few days thereafter the motion was granted, the letters so issued were canceled, and defendant was ordered to turn over to the executor all property of the estate in his hands. The order was conditioned upon plaintiff's filing bond in the sum of seventy-five thousand dollars. The executor appointed by the will found difficulty in securing resident sureties, and, while engaged in this work, the ten days in which resident administrators are required to file bond expired. Thereupon defendant filed a petition for appointment as administrator with will annexed, on the ground that there was a vacancy caused by plaintiff's failure to qualify. No notice was given appellant of this petition. The

application was granted, and letters issued to appellee on the eighth day of November, 1893. Dorris appealed from this order, and, upon a hearing in this court, the case was reversed. See 92 Iowa, 741. The opinion was filed on the seventeenth day of December, 1894. On the sixteenth day of March, 1895, defendant turned over to plaintiff twenty-seven thousand, nine hundred and ninety-seven dollars and fifty-one cents in cash and six thousand, six hundred and sixty-five dollars and ten cents in notes; and on April 29, 1895, he turned over four thousand, two hundred and sixty-eight dollars in money, and also gave plaintiff a receipt for one thousand dollars, being the amount of his legacy under the will. Plaintiff claims there is yet due him interest on all the money while in the hands of the defendant after the death of his uncle, and before payment to the lawfully appointed executor, the sum of one thousand dollars wrongfully paid by the defendant to his attorneys, the sum of one thousand dollars withheld to pay an alleged additional claim of his attorneys, the sum of one thousand, four hundred and fifty-seven dollars and thirty-five cents wrongfully withheld by defendant as compensation for his services as administrator, and a further sum retained by him to pay the taxes and the costs of the litigation growing out of the several appointments. Plaintiff also asks to recover as damages the amount paid out by him as costs and attorneys' fees in endeavoring to preserve the estate and remove the defendant. The total amount claimed by plaintiff is something over ten thousand dollars. The trial court, as we have said, allowed the plaintiff the sum heretofore stated, made up of the one thousand dollars paid by the defendant to his attorneys, four hundred and fifty-seven dollars and thirty-five cents withheld by defendant as compensation for his services, and five hundred and ninety-nine dollars and twenty-five cents yet in defendant's hands,

belonging to the estate. It also made an order disallowing the claim of one thousand dollars for additional attorneys' fees, and denying the defendant compensation for services as administrator. It further denied plaintiff's claim for attorneys' fees and costs, and refused to charge the defendant with interest on the funds in his hands after the death of his uncle, or with the amount paid as taxes. The plaintiff appeals from that part of the order denying him an allowance for attorneys' fees and costs made necessary by defendant's intermeddling with the estate, and refusing to charge the defendant with interest on the funds while in his hands and the amount of taxes paid; and the defendant appeals from the order denying him attorneys' fees and compensation for his services as administrator.

We will first consider the plaintiff's appeal. He argues that he should be allowed the amount paid out by him as attorneys' fees and costs in securing the removal of the defendant. The general rule is
2 that attorneys' fees cannot be recovered from the adverse party, and the only question here is, do the facts of this case bring it within any of the exceptions to this general rule? Counsel for appellant make this citation from Sedgwick, Damages (5th ed), pp. 104, 105: "Where the act complained of is tainted by fraud, malice or insult, the jury which has the power to punish has necessarily the right to include the consideration of the probable counsel fees in their estimate of vindictive or exemplary damages." Attorneys' fees are not allowed under this rule as compensation, but rather as punishment for defendant's wrongful and malicious act. In other words, they may be considered in awarding exemplary damages. In the case at bar the plaintiff does not plead malice, nor did he prove such a state of facts as entitles him to recover such damages. There are, it is true, a few cases in which counsel fees

are or may be allowed,—as in actions on contracts of indemnity, suits for malicious prosecution in some states, actions upon attachment bonds, etc.,—but this case does not fall within any of these exceptions. *Irlbeck v. Bierl*, 101 Iowa, 240; *Newell v. Sanford*, 13 Iowa, 463. The defendant had the right to petition the probate court for appointment as ancillary administrator. Having this right, his motive would not make his conduct actionable. *Jayne v. Drorbaugh*, 63 Iowa, 711. But if it be conceded that he had no such right, and that his conduct was tortious, yet plaintiff is not entitled to recover attorneys' fees paid by him. *Flanders v. Tweed*, 15 Wall. 450; *Oelrichs v. Spain*, 15 Wall, 211; *Barnard v. Poor*, 21 Pick. 378.

II. Should the appellee be charged with interest on the funds in his hands? The general rule is not to charge executors or administrators with interest when their accounts are settled in the ordinary course, for the reason that they are not at liberty to risk the money belonging to the estate, and are to be always ready to pay it over according to the direction of the will or the orders of the court. If, however, they have made actual use of the funds, or delay paying over balances in their hands after demand, or, without any just reason or excuse, retain the money in their hands unemployed when it ought to be invested or paid over, they are chargeable with interest. Generally speaking, however, an executor or administrator is not *prima facie* chargeable with interest during the time the law allows for collecting the estate and settling the accounts, which is usually one year after administration is taken. While the estate is in litigation, it is the general rule not to charge interest. The evidence fails to show that the defendant used the money belonging to the estate. On the contrary, it appears that the money was deposited in a bank to the credit of the John

F. Miller estate, and was subject to check at all times thereafter. Defendant could not safely loan it for any given period because of the litigation which was pending. He made no profit whatever from the money, unless it be that it was of advantage to the bank, of which he was president, to have that amount of money in its vaults. The bank kept the money at all times subject to call, and made no profit on the deposit. Defendant was not asked to make distribution to the legatees, and, under ordinary circumstances, he would be permitted to hold the money for one year after his original appointment, without being called upon to invest or distribute the funds. In the case of *In re Gloyd's Estate*, 93 Iowa, 303, we said: "It is not always easy to determine when and to what extent an executor is justified in holding money and failing to turn it over to those ultimately entitled to it. So much depends upon the condition of the estate that much discretion must necessarily be lodged in the trial court, and we should not be justified in interfering with its action unless it clearly appears that injustice has been done." See, also, *In re Young's Estate*, 97 Iowa, 218. In view of these holdings, and of the facts above recited, we do not think the defendant should be charged with interest. It is said, however, that he wrongfully collected two notes, amounting to about four thousand dollars, which were bearing interest at seven and eight per cent., and deposited the amount in the bank of which he was president for more than one year, without interest. Sufficient answer to this claim is found in the fact that the collections were made under the order and direction of the probate court, and no attack is made upon this order.

III. With reference to the taxes, it is claimed that the money was kept in this state, and made subject to assessment, by reason of the defendant's wrongful intermeddling with the estate, and that, as a matter of fact,

the money was not subject to assessment while in the hands of an ancillary administrator. We do not think it is true that money or property held in this state by an ancillary administrator is not subject to taxation. It may be that, if taxes were paid upon it at the place of principal administration, it should not be taxed here. But this is not the showing. It does not appear that it was ever listed in the state of Pennsylvania. Before the death of John F. Miller, the money which was being loaned by his agent was taxable in this state; and after his death, and until the transfer of the funds to the place of principal administration, it was *prima facie* taxable here. Money in the hands of an executor or administrator is not exempt from taxation simply for the reason that it is not being loaned or invested. These are general rules, which do not require the citation of authorities in their support. See, however, Code 1873, section 803, and *Cameron v. City of Burlington*, 56 Iowa, 320; *Burns v. McNally*, 90 Iowa, 432. Had there been no interference by the defendant with the administration of the estate, there is no reason to believe that the money and property belonging to the estate would not have been in this state on the first of January, 1894. It would have been unusual, to say the least, to have ordered a transfer of the fund to the place of principal administration before the expiration of a year from the time of the appointment of the ancillary administrator. There was no error in allowing the taxes paid.

IV. We come now to defendant's appeal, and first to the order of the court refusing him credit for the amount paid his attorneys. The claim of these attorneys was for services rendered the defendant in his attempt to perpetuate himself as administrator of the estate of his deceased uncle, and not for services rendered him as such administrator. Defendant was unsuccessful in his endeavor to hold the trust, and we know of no rule of law which will permit

him to make the amount paid by him as attorneys' fees a charge upon the estate. Had he been successful, there would be more reason for such a claim. But he was not; and the evidence tends to show that he made false and untruthful statements in his original petition for appointment as administrator. None of the heirs were threatening a contest of the will, nor were there any creditors of the estate in this state at the time the petition was filed. The good faith of defendant may well be questioned. But, aside from this, we do not think defendant is entitled to credit for the amount paid or

agreed to be paid his attorneys. It is contended
6 in argument that, as the probate court allowed the defendant the sum of one thousand dollars for his attorneys, this is conclusive, and that the order cannot be attacked in this proceeding. No notice of the claim or of the fact that it would be presented to the court for allowance was given the appellant. True it is that defendant's report showing the payment of one thousand dollars to his attorneys was approved by the clerk on the second day of June, 1894, and that this order has never been set aside or vacated; and it is also true that this action was not commenced within three months from the time the order was made. The statute (Code 1873, section 2475) provides that "accounts settled in the absence of any person adversely interested, and without notice to him, may be opened within three months on his application." Now, it has generally been held that after the expiration of three months, these settlements cannot be set aside in the absence of mistake, fraud, or other grounds of equitable relief. *Patterson v. Bell*, 25 Iowa, 150; *Cowins v. Tool*, 36 Iowa, 82; *Kows v. Mowery*, 57 Iowa, 20. Section 2474 of the Code of 1873 provides, however, that "mistakes in settlements may be corrected at any time before final settlement and discharge of the executor." In the case of

Cowins v. Tool, we held that where the estate remains unsettled, and the executor has not been discharged, mistakes that have occurred may be corrected by proper action upon final settlement. Again, in the case of *Clark v. Cress*, 20 Iowa, 50, we said: "Certainly, until in a proper manner, the administrator has been duly discharged from further duties and responsibilities, a party interested is not concluded by these settlements made in his absence and without notice." See, also, *Latham v. Myers*, 57 Iowa, 519; *Dessaint v. Foster*, 72 Iowa, 639. We are of opinion that mistakes in settlements may be corrected at any time before final settlement, and that the provisions of section 2475 limiting the time within which application may be made to open up accounts settled in the absence of parties in interest have no application to mistake or fraud in the settlement of an administrator's intermediate account. At the time the clerk made the order approving the expenditure for attorneys' fees, the records showed that defendant was the lawfully appointed administrator, although the plaintiff had appealed from the order reinstating the defendant. This appeal did not stay proceedings, however, and the allowance of attorneys' fees was probably correct, in view of the condition of the record. We held on appeal that the order reinstating the defendant was erroneous, and that defendant was not entitled to represent the estate. The allowance was made under the mistaken idea that defendant was entitled to administer upon the estate. This may have been a mistake of law, but equity will, in a proper case, grant relief from such a mistake. Moreover, the claim was for service rendered the defendant in endeavoring to sustain his appointment. The district court had held with the defendant, and this gave him a *prima facie* right to counsel fees. It turned out, however, that the district court was in error; and it now appears that

defendant knew when he filed his original petition that there was to be no contest over the will, and that there were no creditors of the estate other than himself. He also knew that the will should be probated in this state, and that there was no reason for a special administrator, for the reason that he was in possession of all the property of the estate. He was further advised of the fact that the will nominated an executor. That it was a mistake to allow attorneys' fees in the face of these facts is clear. Indeed, but little, if any, more evidence is needed to establish fraud. We are of opinion that the settlement was not conclusive, and that the court below was right in charging the defendant with the amount paid his attorneys. See, as sustaining our conclusions, *Allen v. Seaward*, 86 Iowa, 718; *Meeker v. Meeker*, 74 Iowa, 352; *Bennett v. Hibbert*, 88 Iowa, 154. It follows from what has been said that the claim of these attorneys for additional compensation was properly denied.

V. Defendant's counsel concede in argument that he is not entitled to the statutory compensation for services rendered, and they make no claim for additional services. The trial court correctly stated the account between these parties, and its judgment is AFFIRMED.

J. GROETZINGER & COMPANY, *et al.*, Appellants, v. JOHN WYMAN, DES MOINES NATIONAL BANK OF DES MOINES, IOWA, F. H. NICHOLS, W. W. MOONEY & SONS and HENRY H. GRIFFITH.

General Assignment: MORTGAGES. The intention of a chattel mort-
 3 gator, not known to the mortgagee, formed before the execution
 5 of the mortgage, to make a general assignment for creditors, which
 was carried out after the execution of the mortgage does not ren-
 6 der the mortgage a part of the assignment under the statutes by

106 574
 107 206
 107 536

105 574
 109 682

105 574
 113 105

virtue of which both the mortgage and the general assignment would be void if the mortgage was treated as a part of the assignment.

SAME. A chattel mortgage upon an entire stock of goods and the
 2 book accounts of the business does not constitute a general assign-
 3 ment although the possession is given to an agent of the mort-
 5 gagee, where such possession is conditional and the mortgagor
 6 retains the *jus disponendi* upon payment of the debts secured
 which do not apparently exceed two-thirds of the value of the
 property mortgaged.

MORTGAGES: DELIVERY. Under a contract between a debtor and cred-
 1 itor collateral to the execution of mortgages to secure their claims,
 2 mortgages, except to one of the creditors, were delivered at the
 3 time, and an agent of the mortgagees appointed to take possession.
 4 By a condition of the contract, ratification of the contract by the
 other creditor was to be optional. *Held* that, all the creditors hav-
 ing signed the contract, the minds of the parties met in the deliv-
 ery of the mortgages.

FRAUD. Fraud in procuring mortgages cannot be predicated upon
 the acceptance by creditors of mortgages made and delivered by
 4 their debtor, an insolvent, in pursuance of a previous agreement
 that he would execute the same if he should be unable to meet their
 claims in accordance with terms then agreed upon, and which he
 was unable to fulfill.

RECORDING: Agreements. M. executed chattel mortgages to a bank,
 under a written agreement "that said mortgages shall not be recorded
 unless in the judgment of said bank, it shall become necessary for
 4 the protection of the mortgagee, or unless said M. shall be unable
 to secure extensions of time from all other creditors." *Held*, that
 this left the matter of recording within the discretion of the bank.

SAME. An understanding that a chattel mortgage shall not be recorded
 unless in the mortgagee's judgment it is necessary for its protec-
 1 tion or unless the mortgagor shall be unable to secure extensions
 4 of time from his other creditors does not invalidate the mortgage
 6 as against other creditors in the absence of any purpose by the
 mortgagor to obtain an extension of time from his other creditors
 without disclosing the existence of a mortgage.

Appeal from Polk District Court.—HON. T. F. STEVEN-
 SON, Judge.

THURSDAY, MAY 19, 1898.

ACTION to declare certain mortgages, and an assign-
 ment for the benefit of creditors, fraudulent. Decree

dismissing the petition, and plaintiffs appeal.—*Affirmed.*

E. T. Morris, Park & Odell, Dunshee & Allen and Granger & Bennett for appellants.

Dudley & Coffin and Cummins, Hewitt & Wright for appellees.

LADD, J.—Early in January, 1894, Thomas A. Mansfield, who had been engaged in the wholesale leather and saddlery business at Des Moines for several years, discovered, upon taking an inventory, that his assets amounted to eighty-six thousand, seven hundred and ninety-nine dollars and twenty-five cents, and his liabilities to eight-four thousand and thirty-seven dollars and sixteen cents, leaving the small margin of two thousand, seven hundred and sixty-two dollars and ninety cents in his favor. Thereupon he exhibited a statement of his financial condition to William Mooney, of Mooney & Sons, and to R. T. Wellslager, president of the Des Moines National Bank. After several conferences, a contract was entered into, January 16, 1894, reciting Mansfield's indebtedness to the bank to be forty-eight thousand, six hundred and fifty dollars, and that to W. W. Mooney & Sons, of Columbus, Indiana, nine thousand, one hundred and eighteen dollars and forty cents; the demand of these creditors for security, and Mansfield's belief that, with indulgence, he would be able, in the ordinary course of business, to discharge his liabilities; and providing that in consideration of one dollar, and the promise of said creditors not to enforce all of said indebtedness at the present

1 time, Mansfield, upon his part, agreed to pay said parties a certain amount during that and each of the five months following, and: "Third. That he will, in case demand be made upon him by either the said

Des Moines National Bank or said W. W. Mooney & Sons, give unto them (said bank and W. W. Mooney & Sons) a chattel mortgage upon all his stock of merchandise, consisting of saddlery, hardware, harness, leather, and findings, and store fixtures, of every kind and character whatsoever, owned and kept by him in storerooms Nos. 221 and 223 Court Ave., and also in room No. 209 West Third street, and room over 219 Court Ave., in the city of Des Moines, Polk county, Iowa, and will also, upon like demand, assign unto said creditors, all and singular, his accounts and demands and bills receivable owing to him, and arising out of said business so carried on by him; such chattel mortgage and the assignment of said accounts to be as security for such sums of money as may be due and owing by said Mansfield to the said Des Moines National Bank and W. W. Mooney & Sons, respectively, at the time of giving of such security. And it is further agreed that said creditors shall have a lien upon the above-described personal property and choses in action to secure the performance of this contract upon the part of Mansfield." Mansfield continued in business, but was unable to comply with the terms of the contract. About the middle of February, Mooney & Sons and the bank requested him to secure their indebtedness. He insisted, and they finally conceded, that he was entitled to the entire month of February within which to make payments then maturing. During these negotiations a general assignment for the benefit of his creditors was signed, with the intention of placing it on record in event the bank or Mooney & Sons attempted to obtain preferences; but this was afterwards destroyed. On February 28th the attorney of Mansfield notified the bank that he was unable to meet the payments under the contract, and was ready to execute the mortgages, but desired a conference of the officers of the bank. This was had, and, as the outcome, Mansfield executed a

chattel mortgage upon his entire stock of goods, fixtures, and tools owned by him, and also transferred and assigned all book accounts, demands, or bills receivable, due or to become due, to the Des Moines National Bank, to secure the payment of eighteen thousand, five hundred and fifty dollars; also, a mortgage describing the identical property to W. W. Mooney & Sons, securing the payment of seven thousand, six hundred and seventy-six dollars and forty-eight cents; also, another mortgage to F. H. Nichols, trustee, covering the same property, securing notes to the amount of twenty-nine thousand, six hundred dollars. It may be added that these notes had been executed by Mansfield to Mooney & Sons, indorsed by the latter firm, and discounted by Mansfield to the Des Moines National Bank, and that Nichols simply acted as trustee for the bank. No question is made as to the validity of the indebtedness secured. At the time these mortgages were executed a

contract was entered into, reciting the execution
2 thereof, and as follows: "Now, therefore, it is agreed that T. E. Given shall take possession of said property as the agent of said mortgagees, and shall account to them for all expenses paid by him, and money and property thus coming into his possession; that said mortgages shall not be recorded unless, in the judgment of said bank, it shall become necessary for the protection of the interests of said mortgagees, or unless said Mansfield shall be unable to secure extensions of time from all of his other creditors; that if such extensions shall be secured, and if it shall not be necessary to record such mortgages as aforesaid, that said Mansfield shall remain in charge of such business; said Given still accounting to such mortgagees for all receipts and collections aforesaid; said Mansfield receiving not to exceed \$150.00 per month for his services; and no purchase of goods shall be made, or indebtedness incurred,

except upon the consent of said mortgagees, but all expenses shall be cut down as fast as possible, and goods purchased upon such consent shall be paid for by said Given from the money received by him. The delivery of said mortgage to W. W. Mooney & Sons is conditioned upon their acceptance of, and ratification of this agreement; and, should they refuse to accept or ratify the same, then said Mooney & Sons shall be remitted to such rights as they may have under the agreement entered into by said Mansfield, said bank, and said Mooney & Sons, dated January 16, 1894; and in such event nothing contained in this agreement, nor the acceptance by said bank of the mortgage herein mentioned as made to said bank, shall deprive said bank of its rights under said agreement of January 16, 1894, or have any effect whatever upon its said rights." On the same evening, without the knowledge of the mortgagees, Mansfield executed a mortgage to H. H. Griffith, as trustee, securing the claim of G. D. King for the sum of eight hundred and forty-eight dollars and ninety cents, and an attorney's fee of five hundred dollars owing Henry, and signed a deed of general assignment for the benefit of creditors to John Wyman. These were left in the hands of Griffith, with instructions to secure the acceptance of Wyman, and place on record when directed. Mansfield and Reynolds, cashier of the bank, arranged to meet at the Great Northern Hotel in Chicago the following day, and each telegraphed Mooney to this effect. Reynolds, after conversing with Mooney, went to the hotel, where he met Mansfield and Henry, and Mooney soon followed. An appointment was made for the afternoon, and they again met, when Mooney signed the contract heretofore referred to. It appears that the Globe Tanning Company, of Louisville, Kentucky, of which Thomas Mooney was president, was also a creditor. After the contract had been signed,

Mansfield asked Mooney if this company would extend the time of payment, and was informed it would not. Upon inquiries, he was then told that the company would proceed against him by attaching his property. Henry at once telegraphed to Griffith to file the deed of general assignment for record. Reynolds had already telegraphed the bank to record the three mortgages, and Mooney, in behalf of the Globe Tanning Company, had ordered the attachment proceedings. The
3 three mortgages were filed first, though less than a half hour prior to the filing of the mortgage to Griffith and the assignment to Wyman. The plaintiffs have recovered judgments against Mansfield, and join in this action, asking relief against the mortgages of the bank, Nichols, and Mooney & Sons. The evidence shows, without dispute, that there is enough money in the hands of the Des Moines National Bank and John Wyman, as assignee, to satisfy all these judgments. It may be added that Wyman took possession of the property as assignee, and, under the direction of the court, sold it, and applied the proceeds to the payment of the mortgages attacked.

I. The contention of appellants that the minds of the parties never met in the matter of delivering the mortgages is not sustained by the evidence. By the terms of the contract, those to the bank and
4 Nichols were delivered at the time, and Given appointed to take possession as their agent. The conditions relate to ratifications by Mooney & Sons, and this firm accepted the mortgage by signing the contract. Nor were these securities obtained by fraud. Under the agreement of January 16, 1894, Mansfield had obligated himself to execute them, and in so doing he was simply complying with the terms of that contract. This contract was not pleaded, but was admissible in evidence, as bearing on the *bona fides* of the transaction. As to

whether there was an oral understanding that the mortgages should not be recorded, there is some conflict in the evidence, but we are satisfied that the mortgagees expressly refused to enter into any such arrangement. The understanding was reduced to writing, and this provides "that said mortgages shall not be recorded unless, in the judgment of said bank, it shall become necessary for the protection of the mortgagee, or unless said Mansfield shall be unable to secure extensions of time from all his other creditors." This left the matter of recording within the discretion of the bank. It could record or not, as it might see fit. If Mansfield was unable to secure the extension of time for the payment of other claims, it was recognized that he could not go on with his business, and in that event the matter of recording was immaterial to him.

II. Nor was it the purpose of the agreement to withhold the mortgages from record in order to enable Mansfield to obtain an extension of time from his other creditors without disclosing their existence. Even though Mansfield had such intention, if it was not disclosed to the defendants the validity of their mortgages was not affected. *Kohn v. Clement*, 58 Iowa, 589. While his testimony tends to show such an understanding, he is contradicted by several witnesses, and his attorney is unable to recall any such conversation. We think the evidence fairly warrants the conclusion that he was hopeful of leniency from his creditors, with whom he had dealt for many years, and believed, by explaining the exact condition of his business, further time would be given within which to meet their demands. The advantage of doing this himself before any reports reached them from others was well understood. The immediate recording of the mortgages would be likely to precipitate a contest, which would defeat his object. They were to be withheld to enable

him to obtain extension from his creditors by telling the truth, and not by misleading them. If Mansfield had any other purpose, we think the evidence fails to show that it was disclosed to the mortgagees; and they had the right to rely upon him acting in good faith, rather than the contrary. A sufficient answer to this contention, however, is that the mortgages were in fact recorded, and the unlawful purpose, if it existed, was never carried out. The mere purpose to defraud, without more, is not actionable.

III. The mortgages did not constitute a general assignment, because not so intended by the parties. The purpose was to secure the payment of a valid indebtedness, in pursuance of the debtor's promise made six weeks before. They were not executed to Given, as trustee, but he was merely
5 made the agent of the mortgagees in satisfying the debt from the incumbered property. Even this possession was conditional, and Mansfield expected to adjust his affairs and resume his business. While not in possession, he retained the *jus disponendi* upon payment of the debts secured, which apparently did not exceed two-thirds of the value of the property. He did not intend to divest himself of the title or control. The facts bring the case within the rule approved in *Lampson v. Arnold*, 19 Iowa, 479; *Aulman v. Aulman*, 71 Iowa, 124; *Gage v. Parry*, 69 Iowa, 605; *White-Lead Co. v. Haas*, 73 Iowa, 399; *Bank v. Crittenden*, 66 Iowa, 240; *Kohn v. Clement*, 58 Iowa, 592.

IV. The appellants insist that the mortgages are a part of the general assignment for the benefit of creditors, and constitute a preference. It will be remembered that Mansfield had formed the plan of giving the mortgages, and preparing a deed of general assignment,

to be filed in event he was unable to satisfactorily
arrange with his other creditors before any of the
6 instruments were executed. The mortgages were
executed before this deed was signed, and the
delivery of the latter was contingent upon his failure
to obtain concessions from his other creditors. If he
should succeed, the assignment would not be made. The
execution of the mortgages, however was not depend-
ent upon any contingency. Certainly, until the happen-
ing of this contingency, Mansfield did not intend the
assignment to be effective. But, if it be conceded that he
was carrying out a preconceived plan of disposing of his
entire property, the mortgagee had no knowledge of any
purpose on his part save that of securing an indebted-
ness due them. It is said, however, that if the debtor
makes a preference under such circumstances, and
thereby violates the statute, the intent or knowledge
of the creditor is immaterial. This point is not deter-
mined in *Lampson v. Arnold*, 19 Iowa, 479; for it is
there held that he might discharge debts by the pay-
ment of money or property, even though after an assign-
ment had been determined upon. Such payments were
no part of the transaction by which the debtor's prop-
erty was assigned. See *Van Patten v. Burr*, 52 Iowa,
518. In the same case, reported in 55 Iowa, 224, this
language is used: "The preponderance of the evidence,
we think, shows that the mortgage to John Ruch,
though dated on the 30th, was in fact executed and
delivered on the 29th of November. But, whether exe-
cuted or delivered upon the 29th or 30th of November,
we are satisfied that it was executed and delivered
before the assignment, and without any knowledge
upon the part of Ruch of the intention to execute the
assignment. The mortgage, so far as the evidence
shows, formed no part of the general assignment, but
was altogether distinct and separate from it. It was

valid at the time of its execution, and is not invalidated by the subsequent execution of the assignment." While the want of knowledge is mentioned, it does not appear that this was the controlling consideration in the case, although so stated in the syllabus. We call attention to this because of appellees' contention that the case is decisive of the question now before us. It has never been passed upon in this state, and the decisions elsewhere are not in harmony. In *Preston v. Spaulding*, 120 Ill. 208 (10 N. E. Rep. 903), the court says: "It is a misapprehension to suppose that this voluntary assignment act attempts to regulate the conduct of creditors. What it does is to regulate the conduct of the debtor, and declare void preference made or given by him in an assignment of his estate." In *Bank v. Rehn*, 126 Ill. 461 (18 N. E. Rep. 788), the question is disposed of in this remark: "Since the decision of this court in *Preston v. Spaulding*, 120 Ill. 208 (10 N. E. Rep. 903), the law must be regarded as settled in this state that, after a debtor has made up his mind to make an assignment of his property for the benefit of his creditors, all conveyances, transfers, and other dispositions of his property or assets, made in view of his intended general assignment, whereby a preference is given, will be held to be within the prohibition of the statute, and void, the same as though incorporated in the deed of assignment itself." See, also, *Hanford Oil Co. v. First National Bank of Chicago*, 126 Ill. 584 (21 N. E. Rep. 483). *White v. Cotzhausen*, 129 U. S. 329 (9 Sup. Ct. Rep. 309), followed the construction given by the supreme court of Illinois. See *Union Bank of Chicago v. Kansas City Bank*, 136 U. S. 223 (10 Sup. Ct. Rep. 1013). It is said in *Sturtevant v. Sarbach*, 58 Kan. 410 49 (Pac. Rep. 522): "An assignment with a preference is not permissible under any circumstances, and in such cases mortgages made at the same time, or any other

attempted preference, must be treated as a nullity, without regard to the knowledge or good faith of the creditor attempted to be preferred. His ignorance of the purpose of the assignor to make an assignment, or good faith in attempting to secure a preference does not affect the assignment or change the rule of *pro rata* distribution for which the statute provides." Thus, the conclusions, rather than the reasons for reaching them, are stated in these cases. The statutes of these states invalidate the preferences, not the deed of assignment, as in Iowa, and the preferred creditor is simply relegated to his *pro rata* share of the assigned estate. Here, if the security constitutes a preference, and is adjudged a part of the general assignment, both are void. The result is an important consideration in construing the law. If the validity of a mortgage executed by a debtor in failing circumstances, is wholly dependent on the condition of his mind, without regard to what the creditor may know, then security under such circumstances cannot be taken without hazarding the collection of the debt. What might be in the debtor's mind cannot be definitely ascertained, and, instead of additional assurance of payment, the security would simply place the creditor at the mercy of his debtor. Our statute does not require a construction which will render hazardous the taking of security for the payment of an honest debt, or which will necessarily limit the possibilities of the debtor in guarding his interests by giving better assurance of final satisfaction. This conclusion is not unsupported by authority. The question is touched in *Lake Shore Banking Co. v. Fuller*, 110 Pa. St. 156, (1 Atl. Rep. 731), and this language used: "Nor can we agree that a mere intent of the debtor, unexpressed to the creditor, to give him a preference by paying or securing the debt, although at the time he contemplated, and soon after executed, a general assignment, operates to defeat such

preference, on the ground that it is contrary to the act of 1843. Such an intent is not unlawful, and cannot be inferred from a proper act. But, even if it were, the creditor, who has a perfect right to accept payment or security of his debt, and has not participated in the alleged unlawful intent, should not be compelled to forfeit his preference on that account. He, at least, is innocent, and may in good conscience hold the advantage he has obtained." The supreme court of Indiana, in declining to follow *Preston v. Spaulding*, *supra*, employ this language: "So long as the proposed assignment remains mere matter of intention, contemplation, or determination, the debtor has done nothing to abdicate the dominion which the law gives him over his property. He may be hopelessly insolvent for months, or, indeed, as is averred in this complaint, he may be insolvent for more than a year, before he makes the assignment. During all of that time he may know of such insolvency, and may contemplate making an assignment. Indeed, he may fully reach the determination to make it, but defer the execution of that purpose; and, when such purpose is finally consummated, will it do to say that a court of equity will attempt to reach back, and undo all preferences given since that determination took form in his mind? Many practical difficulties would beset the chancellor in attempting to apply such a rule. Reaching the determination to make such assignment is a mental process in the debtor's mind. How may the time be fixed when he thus determined? How far back would the chancellor go in his inquisition into the debtor's state of mind? Certain formalities are necessary to consummate such a purpose, and we think it may fairly be said that, when the debtor has once entered upon the doing of these formal

acts necessary to make the assignment, he cannot thereafter make any valid preference, if he preserves and completes the assignment thus begun." *John Shillito Co. v. McConnell*, 130 Ind. 31, (26 N. E. Rep. 832). It is true, as stated by the appellants, that the holding in Pennsylvania is that preferences, to invalidate the general assignment, must be contained in the same instrument, and in Indiana must be executed contemporaneously therewith. The New York statute permits preferences to the extent of one-third in value of the debtor's property; but, if in excess, they are reduced to this amount, and the assignment does not become void. See *Abegg v. Bishop*, 142 N. Y. 286 (36 N. E. Rep. 1085); *Central Nat. Bank v. Seligman*, 138 N. Y. 435 (34 N. E. Rep. 196). The question under consideration was before the court of appeals of New York in *Manning v. Beck*, 129 N. Y. 1 (29 N. E. Rep. 90); and the court, through Peckham, J., said: "Any preference the debtor therein makes which runs counter to the statute must be treated as the statute directs, and the intent of the assignor in giving the preference is wholly immaterial. But the statute does not, and was not intended to, prevent a creditor from obtaining payment or a security, and thereby a preference for his debt, even from an insolvent debtor; and, where a court is asked to set aside a security which is disconnected from and prior to any general assignment, on the ground that it is a violation of the act in relation to preferences in general assignments, it at once becomes a question whether that act was ever intended to cover a case where the creditor obtaining or availing himself of such securities was ignorant of any existing intention on the part of the debtor to thereafter perform an entirely separate act, and make a general assignment. It does not in terms cover such a case, and we think it should not be thus extended by construction." We conclude that even though at the time a mortgage is executed the debtor

has determined upon a general assignment of all his property for the benefit of his creditors, which he afterwards makes, if this fact is unknown to the creditor, the mortgage received in good faith to secure a valid indebtedness does not become a part of the scheme, but is a separate and valid instrument.—AFFIRMED.

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BERRY FRANK, Appellant, v. W. J. DAVENPORT, Sheriff,
and R. B. JOHNSON, Appellees.

Accepting Jury: *WAIVER.* A party who accepts the jury and comes
1 to trial without objecting cannot be heard to complain either of
the character of the jury or the time of the trial.

Appeal: *CURING.* It is not prejudicial error for the court, in its charge
to state that one was in possession of property at the time of levy,
5 where the evidence showed that he was in sole charge, and the
jury were instructed as to the effect of such possession in case it
should be found that he was only an employee.

HARMLESS ERROR: *Instructions.* It is not prejudicial error for the
court to read to the jury a pleading in the action which there is
4 no evidence to support where the court later in its charge called
the jury's attention especially to the issues which had support in
the testimony.

INSTRUCTIONS CONSTRUED TOGETHER. The appellate court will con-
5 sider the instructions complained of, in connection with the charge
as a whole.

MISCONDUCT OF COUNSEL: *Waiver.* The failure of the appellant to
call the trial court's attention to the conduct of the counsel in pre-
8 senting the case to the jury justifies the supreme court in refusing
to grant any relief on that ground.

SAME: *Affidavits.* Misconduct of an attorney in presenting a case to
2 the jury which occurs in the presence of the court cannot be shown
on appeal by affidavits.

Appeal from Union District Court.—HON. H. M. TOWNER,
Judge.

THURSDAY, MAY 19, 1898.

PLAINTIFF brings this action to recover damages of defendants for the alleged wrongful conversion of certain personal property of which he claims to be the owner. There was a jury trial, verdict and judgment for defendants, and plaintiff appeals.—*Affirmed.*

D. W. Higbee for appellant.

Bull & Fry for appellees.

WATERMAN, J.—The petition avers that the defendant R. B. Johnson, holding a judgment against one L. Frank, procured execution to be issued thereon, and placed the writ in the hands of his co-defendant Davenport, who was sheriff of Union county, and maliciously directed said sheriff to levy the same upon forty-four sacks of old rubber belonging to plaintiff; that, in pursuance of said directions, the sheriff levied upon said property, and took and carried it away, and keeps and retains the same; that plaintiff served written notice on said officer to release said property, but that he has failed and refuses so to do. Judgment is asked for one hundred and thirty-eight dollars and twenty-five cents. The defendants filed separate answers, and in effect justify their action by alleging that the rubber levied upon was in fact the property of the judgment debtor, L. Frank.

II. Appellant's first ground of complaint is that "the verdict of the jury is the result of passion and prejudice, and is wholly unsupported by the evidence." In this connection we may well consider his second assignment of error, which is as follows: "The verdict of the jury was manifestly the result of political prejudice and religious bigotry, induced by improper remarks in argument by appellees' counsel." As tending to sustain these claims, appellant attaches his affidavit to

the motion for a new trial, in which he says: "That the jury in said cause were composed in large part of Populists and others who are in favor of free silver, and at the time of said trial there was a political canvass in progress, in which great interest and excitement existed; further, this plaintiff belongs to the Hebrew race, and all of said jurymen were Gentiles, many of them belonging to the different Protestant churches," etc. We hardly think that plaintiff means to charge that a belief in the doctrines of Populism necessarily unfits a man for jury duty, though such is a fair inference from the allegations of his motion and the averments of his affidavit. We may say also that it is difficult to understand exactly the grounds of the complaint that this trial was had while an exciting political canvass was being made. We do not know whether plaintiff thinks the campaign should have been postponed until the case was tried, or that the case should have been continued until the campaign was closed. Perhaps these matters can be disposed of by the suggestion that the plaintiff accepted the jury, and went to trial, without objection, and he cannot therefore be heard now to complain, either of the character of the jury or the time of the trial.

III. But it is also said the jury was composed entirely of Gentiles, while plaintiff is a Hebrew, and that defendants' counsel aroused the prejudice of the jurors by an inflammatory appeal. The language complained of was used in the address of counsel to the jury, and it is presented here by affidavit. Misconduct of an attorney in presenting a case to the jury, which occurs in the presence of the court, cannot be shown by affidavit. *Rayburn v. Railway Co.*, 74 Iowa, 637; *State v. La Grange*, 99 Iowa, 10. We may also add that the use of the language charged is denied by counsel for defendant. It does not appear that plaintiff's counsel thought the

matter of sufficient importance to call the trial court's attention to it at the time. We might, for this reason, refuse to grant any relief on this ground. *Ross v. City of Davenport*, 66 Iowa, 548.

IV. There are two other assignments of error. The trial judge, by consent, charged the jury orally, and prefaced what he had to say by reading the pleadings. It is said there was error in reading the answer of R. B. Johnson, there being no evidence to support
4 its averments. It was a pleading in the case, however, and there was no serious impropriety in reading it; certainly no prejudicial error, for later in the charge the court called attention specially to the issues which had support in the testimony. *Lanning v. Railroad Co.*, 68 Iowa, 502; *Morrison v. Railway Co.*, 84 Iowa, 663.

Nor is there any just ground of complaint because the court, in instructing the jury, stated that L. Frank was in possession of this property at the time the levy
5 was made. The evidence shows without dispute that he was in charge of the store at the time, and that Berry Frank, the plaintiff, was not present. The jury could not have misapprehended what was meant, for they were fully instructed afterwards as to the effect of the possession of L. Frank in case it was found that he was only an employe of plaintiff. The error, if any was without prejudice. The instructions should be considered together. *Kohn v. Johnston*, 97 Iowa, 99. When so taken, the charge of the court presents a correct exposition of the law of the case. There was evidence sufficient to support the verdict, and no material error having been committed by the court, the judgment below will be AFFIRMED.

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JOHN HARWARD V. W. C. DAVENPORT, Sheriff, Appellant.

Estoppel: Hogs were sold on execution against a son who lived on his father's farm, which he assisted in managing, and where the property was located. The father owned them, but had authorized
1 the son to execute a chattel mortgage in them, which he did, reciting that he himself was owner, and the mortgage was recorded. There was no evidence that the execution in the son's name was authorized by the father, who brought replevin against the purchaser. *Held*, no estoppel.

SAME. A statement made by the owner of property indicating its
2 ownership by another is not available to establish an estoppel in
6 favor of one who did not know of such statement at the time he dealt with the property.

Replevin: JUDGMENT: Scope of action. Under Code, 1873, section 3239, providing that the right of plaintiff in replevin in the prop-
7 erty shall be designated by the judgment, and, if he is not in possession, then it is to find the value of his right, a money judgment in plaintiff's favor for the value of the property, less the amount of the chattel mortgages to which it was subject, is proper.

SAME. The interest of plaintiff in the proceeds of a sale of property under execution, after the payment of mortgages held by the
7 defendant, may be determined in an action to recover the possession of specific personal property unlawfully seized under execution, although defendant was entitled to the possession of the property when the action was commenced, by virtue of the mortgages.

Plea and Proof: VARIANCE: Replevin. Under Code, 1873, section 2686, that no variance shall be deemed material unless it misleads the adverse party to his prejudice, and section 2729, that a party shall not be compelled to prove more than the relief asked for or
3 a lower degree included therein, proof that a plaintiff in replevin is the owner of the property, subject to chattel mortgages in favor of third persons, is not a fatal variance from an allegation that he is the absolute and unqualified owner thereof.

Instructions. An instruction to find an estoppel if the plaintiff "knowingly and wantonly suffered and permitted" certain facts to
2 be held out is not misleading as given, though the word "wantonly" alone would require too great a culpability.

VERDICT. Under a charge that plaintiff in replevin must prove "absolute" ownership of the property, a verdict in his favor on

4 evidence of ownership subject to a chattel mortgage is not contrary to the instructions, where, though inaccurate, the word "absolute" was not so used as to mislead the jury.

Appeal: REVIEW: *Trivial errors.* Trivial errors in the admission or rejection of evidence will not work a reversal, where the controlling facts are so fully established as to leave no question of the justice of the verdict.

DEEMER, C. J., dissenting.

Appeal from Woodbury District Court.—HON. JOHN F. OLIVER, Judge.

FRIDAY, MAY 20, 1898.

ACTION at law to recover the possession of specific personal property. There was a trial by jury and a verdict and judgment for the plaintiff. The defendant appeals.—*Affirmed.*

Shull & Farnsworth for appellant.

Sullivan & McMaster for appellee.

ROBINSON, J.—On the seventeenth day of February, 1896, the defendant, as sheriff, levied upon sixty-two hogs, an execution issued on a judgment rendered by the district court of Woodbury county in favor of Toler-ton & Stetson Company and against M. E. Harward, and on the fourteenth day of the next month sold them by virtue of the execution. This action was commenced in February, 1896, to recover the possession of the hogs. The petition alleges that the plaintiff is the absolute and unqualified owner of the hogs, and demands judgment for their return or for their value, and for damages and costs. The jury found specially that the plaintiff was the owner of the hogs when they were taken by the defendant, but that the latter was entitled to the possession of them by virtue of two chattel mortgages; that the value of his interest in the property was one hundred and forty-eight dollars and thirteen cents; and

that the value of the property was three hundred and nine dollars and twenty cents. The plaintiff elected to take a judgment for the value of his interest, and judgment was rendered in his favor for one hundred and sixty-one dollars and seven cents, with interest and costs.

I. The evidence authorized the jury to find that the hogs in question were, at the time the levy upon them was made, owned by the plaintiff, subject to two mortgages thereon which he had authorized his son

M. E. Harward to execute. The defendant contends that the plaintiff is estopped to claim ownership as against the Tolerton & Stetson Company because he had authorized his son to execute the mortgages. They were executed in the name of the son, and were recorded before the levy was made. One of them was given on the twentieth day of December, 1895, to Mrs. E. E. Huntley, and described the property mortgaged as "seventy head of hogs, now being fattened by me on the farm of John Harward, in Lakeport township, Woodbury county. * * *" The mortgage also contained the following: "It being my intention to mortgage all property of the respective kinds above described that I now own, the same being free from incumbrance, and in my possession on farm of John Harward, in Lakeport township. * * *" The second mortgage was executed a week later to Davis & Co., and described the property mortgaged as "about seventy head of hogs and pigs, being all the hogs and swine owned by me and in my possession on farm known as 'Harward Farm,' in Lakeport township, being the premises now occupied by me, subject to a mortgage given to Mrs. E. E. Huntley. * * * The above-described property is owned by me free from all incumbrance, and now in my possession on premises described above." The plaintiff owned and carried on

the farm on which the hogs were kept before they were taken by defendant. M. E. Harward, known as Mike, worked for his father by the month, and was active in the management of the farm, in caring for the stock, and in transacting business for his father, who was more than seventy years of age, in poor health, and unable to transact much of his business. The mortgage to Mrs. Huntley was given to secure a debt which the father owed, and the mortgage to Davis & Co. was given to secure an indebtedness owed by both father and son. The father told Mike to execute mortgages on the hogs to secure those claims, but it does not appear that any direction was given as to the name or form in which either should be executed, and it does not

2 appear that the plaintiff knew that they stated that Mike was the owner of the property. The charge of the district court, in referring to the estoppel claimed by the defendant, authorized the jury to find an estoppel established in case the plaintiff "knowingly and wantonly suffered and permitted the said M. E. Harward to hold himself out to the world as the owner of the hogs," and if Tolerton & Stetson Company would not have caused the levy in question to be made "but for the acts of the plaintiff in knowing and wantonly allowing and permitting the said M. E. Harward to represent himself as the owner of said property," and if certain other facts were proven, but not otherwise. The appellant complains of the use of the word "wantonly." "Wantonness" is defined to be "a licentious act by one man towards the person of another, without regard to his rights," and may include the element of recklessness. Bouvier Law Dictionary; Black Law Dictionary; Webster International Dictionary; 28 Am. & Eng. Enc. Law, 596. And the word "wantonly," used in that sense, would be objectionable in requiring too great a degree of culpability on the part

of the plaintiff to constitute an estoppel. Mere negligence on his part, or silence when it was his duty to speak might be sufficient. But the word "wantonly," as used in the charge, had a passive, rather than an active, significance, and could not have misled the jury as to the facts required to constitute an estoppel, and, although we do not approve the use made of the word, we do not think it could have been prejudicial. An examination of the entire record convinces us that the evidence would not have justified the jury in finding that an estoppel had been proven in favor of the defendant.

II. The petition alleges that the plaintiff is the "absolute and unqualified owner" of the hogs in question, and it is said that the proof does not sustain the averment, for the reason that it appears without dispute that the hogs were incumbered by two mortgages when the execution was levied upon them. Sub-
3 division 3 of section 3225 of the Code of 1873, under which this action arose, required that the petition, in an action for the recovery of specific personal property, should state "the facts constituting the plaintiff's right to present possession thereof, and the extent of his interest in the property, whether it be full or qualified ownership." It was said in *Kern v. Wilson*, 73 Iowa, 490, of this provision, that its object was "to advise the defendant of the nature of the plaintiff's claim to the property, to the end that he could intelligently defend." Section 2686 of the Code of 1873 provided that "no variance between the allegations in a pleading and the proof is to be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." And section 2729 of the same Code provided that "a party shall not be compelled to prove more than is necessary to entitle him to the relief asked for, or any

lower degree included therein. * * *” If the plaintiff did not fully sustain the averments of his petition respecting his ownership, the defendant was not misled by the variance between the pleadings and the proof. Tolerton & Stetson Company knew of two of the mortgages, and before the levy was made acquired the ownership of them. A third mortgage, executed after the levy, is not entitled to any weight in this case. The evidence showed that the plaintiff was the owner of the hogs, although his ownership was limited by the mortgages. *Hubbard v. Insurance Co.*, 33 Iowa, 325, 333. It follows from what we have said and the statute quoted, that proof that the ownership of the plaintiff was qualified by the chattel mortgages did not establish such a variance between the pleading and the proof as to defeat a recovery by the plaintiff. The case of *Kern v. Wilson*, *supra*, relied upon by the appellant, differs from this, in that the plaintiff in that case attempted to prove absolute and unqualified ownership by means of a chattel mortgage. See, also, *Darnall v. Bennett*, 98 Iowa, 410.

III. The appellant contends that the verdict is contrary to the charge of the court, because that did not authorize a recovery by the plaintiff unless the evidence showed that he was the “absolute
4 owner” of the hogs when this action was commenced. Complaint is also made of the charge because the words “absolute owner” and “owner” are sometimes used therein as meaning the same. The use of those words was not in all instances accurate, but was not misleading. The appellant also complains of various rulings of the court in admitting and rejecting
5 evidence. In a few instances the rulings were erroneous, but they were so clearly of trivial consequence that we should not be justified in reversing the judgment of the district court on account of

them nor in setting them out at length. The controlling facts were so fully established that the justice of the verdict cannot be successfully questioned. All the evidence which tended to show that the son owned the hogs, of which Tolerton & Stetson Company had knowledge when the levy was made, was the record of the two mortgages he had given, and possibly a statement made by the husband of Mrs. Huntley to the effect that the son owned the hogs. But the only ownership and possession of them which the son had was that which any employe would have of the stock of his principal on his principal's premises, which the employe was required to care for and feed. The plaintiff did not authorize his son to treat the property as his own unless it can be said that he did so for the purpose of giving the two mortgages thereon which we have described. It is true one witness testified that both father and son stated, when the mortgage to Davis & Co. was executed, that the son owned the hogs, and in so doing the witness contradicted the testimony of the plaintiff;

6 but if the statement was made by the father, and was as claimed, it was not only true, but Tolerton & Stetson Company did not, so far as the record shows, have any knowledge of it when the levy was made, consequently could not have relied upon it. Nothing shown by the evidence justifies the conclusion that the transactions between the father and son were designed for any fraudulent or improper purpose.

IV. The appellant complains of the refusal of the court to sustain a motion made by him to transfer the cause to the equity side of the docket, based upon the alleged ground that the answer pleaded an equitable estoppel, and of the refusal of the court to strike from the files a reply to the answer. We do not find any reason for concluding that the motion to transfer should have been sustained, and, although the reply might well

have been stricken from the files, prejudice could not have resulted from the refusal of the court to do so. The objections to these rulings and to numerous others are stated, rather than argued, and do not require any further consideration.

V. The answer of the defendant claims that he was entitled to possess the hogs in question when this action was commenced, by virtue of the two chattel mortgages which Tolerton & Stetson Company obtained, as well as by virtue of the levy under the execution. The defendant in fact took possession of and sold the hogs under the execution, and from the proceeds of the sale paid the mortgage debts.

7 That was done before this cause was reached for trial, and the interest of the plaintiff in the hogs then remained to be determined, and that was properly done. Code 1873, section 3239; *Hayden v. Anderson*, 17 Iowa, 158, 163; *Hibbard v. Zenor*, 82 Iowa, 505, 510; *Harvey v. Pinkerton*, 101 Iowa, 246. We do not understand the appellant to deny that the right to determine the interest of the plaintiff in the hogs existed notwithstanding the fact that he was not entitled to the possession of the property when the action was commenced. We do not find any sufficient ground for disturbing the judgment of the district court, and it is AFFIRMED.

DEEMER, C. J., dissenting.

PERRY SISSON, Appellant, v. JACOB KAPER, *et al.*

Fraud: PAROL VARIANCE OF WRITING. In an action for rent and for damages, under a written lease, where it was averred, by way of counter-claim, that lessee was induced to accept the lease in question by false representations of plaintiff respecting the water supply, and was damaged by reason thereof, evidence competent as establishing such fraudulent representations was not objectionable on the ground that a reformation of the lease was not asked,

105	599
113	149
105	599
120	634

and that such evidence tended to contradict a contemporaneous written agreement.

Contract: CONSIDERATION. A lessee's abandonment of his right to rescind the lease because of fraudulent representations of the lessor respecting the water supply is a sufficient consideration for an agreement by the latter, after the execution of the lease, to furnish a supply of water.

Appeal: ASSIGNMENTS. An assignment that the court erred in not sustaining and in overruling plaintiff's motion for a new trial for the several grounds therein set forth is not sufficiently specific to enable the supreme court to consider the only ground on which the motion should have been sustained, where there were at least eight separate grounds set out in the motion.

ARGUMENT OF ASSIGNMENTS. Assignments of error to the giving of instructions, if relied upon in the supreme court, must be argued

OBJECTIONS BELOW. Advantage cannot be taken on appeal, of an objection that the evidence was insufficient to sustain an allowance for damages, to which the attention of the trial court has not been called.

Appeal from Linn District Court.—HON. WILLIAM G. THOMPSON, Judge.

FRIDAY, MAY 20, 1898.

ACTION at law to recover rent alleged to be due for leased premises, and for damages. The defendants pleaded a counterclaim. There was a trial by jury, and a verdict and judgment for the defendants. The plaintiff appeals.—*Affirmed.*

Giffen & Voris for appellant.

Richard A. Stuart for appellees.

ROBINSON, J.—In October, 1891, the plaintiff and the defendant Jacob Kaper entered into an agreement in writing, by which the former leased to the latter, for the term of three years from and after the first day of March, 1892, a certain farm, at an annual rent of three hundred and eighty-seven dollars and fifty cents. The

defendant Kula signed the lease as surety for Kaper. The plaintiff seeks to recover fourteen dollars for rent due, and two hundred and twenty-one dollars for damages alleged to have been caused to buildings, trees, and fences, for subletting the premises, and for failing to perform certain labor as required by the lease. The defendants admit that fourteen dollars of the last year's rent have not been paid according to the terms of the lease, and deny the alleged breaches of contract and responsibility for the alleged damages. They aver, by way of counterclaim, that the plaintiff, for the purpose of inducing Kaper to accept a lease of the farm, falsely stated to him that there was an abundant supply of water on it, sufficient for all house uses and for stock purposes; that the statement was false, and known to the plaintiff, when he made it, to be false, but that Kaper believed it to be true, and relied upon it in taking a lease of the premises; that the supply of water proved to be wholly inadequate, and, in consequence, some of the stock of Kaper died, and milk cows were injured, and their capacity to give milk impaired, all to the damage of Kaper in the sum of one thousand dollars, and for that sum he demands judgment against the plaintiff. The verdict and judgment were for the sum of one hundred dollars, exclusive of costs.

I. The appellant complains of the rulings of the court which permitted the defendants to introduce evidence in support of their claim that the plaintiff had made false representations respecting the supply
1 of water on the farm, on the ground that a reformation of the lease is not asked, and that the evidence in question tended to contradict a contemporaneous written agreement. The rule which the appellant thus seeks to invoke does not apply for the reason that the counterclaim is not based upon the written lease, but upon alleged fraud, which caused

Kaper to accept it; and the evidence objected to was competent, as tending to establish the fraudulent representations pleaded. *Humbert v. Larson*, 99 Iowa, 275; 1 Greenleaf Evidence, section 284; Bradner Evidence, 143, 208.

II. The defendants pleaded and submitted evidence which tended to show that, upon complaint being made to the plaintiff of the lack of water and of the need for it, he agreed to furnish water, and made some attempts to do so. The plaintiff objected to the evidence, and now complains of it, on the ground that the agreement was made after the lease was entered into, and therefore was without consideration. It is
2 sufficient to say, in answer to this objection, that if Kaper was induced to sign the lease, and take possession of the farm thereunder, through fraud on the part of the plaintiff, he had the right to rescind the contract of lease within a reasonable time after discovering the fraud, and to abandon the farm; and there was evidence which tended to show that it was to prevent his doing so that the plaintiff made the subsequent verbal agreement to furnish water, and the waiver by the lessee of his right to rescind and his continued occupation of the premises under the lease would have furnished sufficient consideration for the verbal agreement in question.

III. There was testimony in behalf of the plaintiff which, if true, would have entitled him to recover damages to a considerable amount in addition to the fourteen dollars of the rent provided for by the lease which had not been paid. The evidence on the part of the defendants showed that the supply of water on the leased premises was insufficient; that Kaper was compelled to haul water for his stock; and that several calves which he owned died. Whether the proper

measure of damages in a case like this would have permitted the value of the calves to be considered in ascertaining the amount Kaper was entitled to recover is not a question presented for our consideration, but the value of the calves is not shown, nor does it appear that they died for lack of water; nor is the value of the services rendered in hauling water shown; nor is there any evidence from which the jury could have ascertained the damages, if any, which Kaper sustained by reason of the alleged breaches of contract. The

3 appellant contends that the district court erred in permitting the jury to allow Kaper anything on his counterclaim. Had proper objection been made, the court should not have submitted to the jury any question respecting the damages claimed by Kaper. The appellant does not call our attention to any portion of the charge on this branch of the case which he claims to be erroneous, but objects to what was done by the district court on the ground that the evidence did not authorize the submission of the case to the jury. In the third paragraph of its charge the court instructed the jury, in substance, that, in making up its verdict, it should allow to each party the amount, if anything, to which he was entitled; and, if the amounts were equal, the verdict should be for the defendants, but, if they were not equal, the verdict should be for the one entitled to the larger amount for what it exceeded the amount due the other party. In the fourth paragraph of the charge the jury was told that if the plaintiff represented to the defendant that there was plenty of water on the premises for the use of stock and the house, and if there was not a sufficient supply for the purposes stated, the measure of plaintiff's damages, if any, would be the reasonable amount, if any, that the defendant was compelled to pay to procure water for the same, or the reasonable amount the defendant was entitled to

for procuring water for the purposes stated, as shown by a fair preponderance of the evidence, and that, if no damage had been shown, the jury was "not to find for defendant thereon." No special complaint is made of that portion of the charge. It is not claimed that it did not give a correct rule had the amount of the injury the defendant had sustained been shown. In fact, neither of the two paragraphs of the charge which we have considered is referred to by the appellant in argument. It is true, formal exceptions were taken to them when they were given, and it was alleged in the motion for a new trial that "the court erred in giving its instructions to the jury from 1 to 4, inclusive. To the giving of same, and to each of same, the plaintiff at the time duly excepted." Error in giving them is also alleged in the assignment of errors, but that is not sufficient.

4 If error in giving them is relied upon it should have been argued. The argument of the appellant on this branch of the case is to the effect that the evidence was not sufficient to sustain an allowance for damages in favor of the defendants. Moreover, the exceptions taken to the charge did not necessarily call the attention of the district court to the objection relied upon here. In *Kirk v. Litterst*, 71 Iowa, 71, the appellant assigned as error that the trial court submitted the cause to the jury on insufficient testimony; but this court held that the appellant could not take advantage of the alleged error, because he did not except to the submission of the cause on the ground stated, and that, if the plaintiff had failed to show that he was entitled to recover, the defendant should have moved the court to direct a verdict in his favor, or should have asked an instruction to that effect. We are of the opinion that in this case the very objection now urged should have been called to the attention of the trial court, to enable the plaintiff to take advantage of it here.

Another method of taking advantage of the insufficiency of the evidence to sustain the verdict was by a motion for a new trial. Such a motion was, indeed, filed, and the ground stated in three paragraphs thereof was the insufficiency of the evidence. But the correctness of the ruling which denied the motion on that ground is not presented by the assignments of error. The only assignment which can be said to include the ground in question is stated as follows: "The court erred in not sustaining and in overruling the plaintiff's motion for a new trial for the several grounds therein set forth." Since there were at least eight separate grounds set out in the motion, the assignment was not sufficiently specific, under the well-recognized rules of practice, to enable us to consider the only ground on which the motion should have been sustained. See *Leekins v. Nordyke & Marmon Co.*, 66 Iowa, 471; *Duncombe v. Powers*, 75 Iowa, 185. We reach the conclusion that sufficient ground for disturbing the judgment of the district court has not been shown, and it is **AFFIRMED.**

B. JOHNSON V. JOHN OTTO, JULIA A. OTTO and THE SIEG IRON COMPANY, Appellants.

105	806
111	650

Mechanic's Lien: STATEMENT. Under Code, section 3092, requiring that a statement of account be attached to the affidavit for a mechanic's lien, setting forth the time when the different items thereon were furnished, mere inaccuracies in fixing the time do not defeat the lien.

Appeal: PRESUMPTIONS. It will be presumed in support of a decree foreclosing a mechanic's lien, that the evidence warranted the conclusion of the court that some of the material was furnished within the statutory period before the commencement of the action, although the statement of account attached to the affidavit for a mechanic's lien as required by Code, section 3092, shows a date beyond the statutory period as that on which the last item of material was furnished.

Appeal from Warren District Court.—HON. J. H. APPLGATE, Judge.

FRIDAY, MAY 20, 1898.

ACTION by plaintiff to foreclose a mechanic's lien on a part of a lot in Bevington, Warren county. The Sieg Iron Company also brought suit to foreclose its mortgage, executed by John and Julia A. Otto, and this action was consolidated with that of plaintiff, and a cross-petition filed by said company, asking for the same relief. The defendants pleaded, among other things, that plaintiff's action was barred by the statute of limitations. There was a judgment for plaintiff, and a decree establishing it as a first lien, and also a decree foreclosing the mortgage of the Sieg Iron Company. The defendants appeal.—*Affirmed.*

Steele & Robbins, Granger & Bennett, and J. W. Bollinger for appellants.

S. W. Lee, and Henderson & Berry for appellee.

LADD, J.—The plaintiff filed his petition March 13, 1896, alleging therein that he furnished lumber, hardware, and other material to the defendant John Otto, to be used in the erection of a dwelling house on a part of a lot owned by him. A mechanic's lien was filed May 11, 1894. The defendant executed his note of two hundred and five dollars and fifty cents, for the balance due, February 10, 1894. The last two items of the account attached to the mechanic's lien, and on which the action is based, are dated February 10, 1894, and the items last previous are dated December 9, 1893. John Otto acknowledged service of the original notice March 10, 1896, and the same was placed in the hands of the sheriff of Scott county for service, and served on

the Sieg Iron Company March 11, 1896. No notice was given Julia A. Otto, but she appeared voluntarily, and filed an answer, April 8, 1896. The answer of the Sieg Iron Company, and those of John and Julia A. Otto allege that no material was furnished by plaintiff under his contract after December 9, 1893. The court entered a decree in favor of plaintiff, as prayed, but found the items of February 10, 1894, were not furnished. The evidence is not before us.

The appellants rely upon an assignment of error to the effect that the court erred in entering a decree for the plaintiff, when, according to its findings, more than two years and ninety days had elapsed between the furnishing of the last item and the beginning of the action. If the last items were furnished not later than December 9, 1893, then two years and ninety-one days had elapsed before the action was begun, and it was barred by the statute of limitations. *Squire v. Parks*, 56 Iowa, 407; *Dimmick v. Hinkley*, 57 Iowa, 757. While section 3092 of the Code requires the statement of account attached to the affidavit for a mechanic's lien to set forth the time when the material was furnished or the labor performed, mere inaccuracy in fixing the time will not defeat the lien *Bangs v. Berg*, 82 Iowa, 350. If the items of December 9th were in fact furnished a few days later, then the right to maintain the action was not barred by the statute. Every fair presumption must be indulged in favor of the correctness of the decree, and, in order to uphold it, we infer that the evidence warranted the conclusion of the court that some of the material was furnished some days after December 9th, though the time was fixed as of that date, or earlier, in the statement of account and petition. See *Ward's Heirs v. Cochran*, 36 Iowa, 432.—AFFIRMED.

JOHN D. BLUE and ELLA BLUE V. LOUIS HEILPRIN &
COMPANY, *et al.*, Appellants.

Homestead Right: ACTUAL OCCUPANCY. Plaintiff purchased a lot, and began the erection thereon of a house, for his home. The homestead then occupied by him was then sold, and during the building of the new house he resided in a rented one. Some articles were removed to a shed on the new premises, and plaintiff cultivated a garden there, but the greater part of the household goods were moved into the rented house. On completion, the family moved into the new house, and used it as a homestead. *Held*, that the homestead character attached only from actual occupancy of the premises.

EXEMPTIONS. The homestead character attaches to a lot purchased for a homestead from the time the purchaser disposes of his former homestead using the proceeds thereof to pay for the new homestead although at that time there was no house upon the lot, but the exemption from debts accruing prior to such occupation is limited to the extent of the value of the old homestead under Code, 1873, section 2000, authorizing the owner to change the limits of the homestead or to "change it entirely" with the concurrence of the husband or wife, and section 2001, exempting the new homestead to the extent in value of the old from execution in all cases where the old homestead would have been exempt; and the homestead may be sold subject to such exemption if it appear that the debtor's other property has been exhausted in satisfaction of the debt.

CHANGE. Independently of a change a homestead right will not attach as contemplated by Code, 1873, section 2000, to a lot purchased for a homestead until the occupation of the house erected thereon, although prior to the time the owner had commenced the construction of a house to replace that removed from the lot when he purchased it, and had sold his former homestead

Appeal from Benton District Court.—HON. G. W. BURNHAM, Judge.

FRIDAY, MAY 20, 1898.

PLAINTIFFS, husband and wife, bring this action against Louis Heilprin & Co., and the members of said

co-partnership, who are judgment creditors of John D. Blue, and against S. H. Metcalf, sheriff. They ask that the levy and sale of the premises described, made by said sheriff to the other defendants under an execution issued on said judgment, be set aside, and the issuing of a sheriff's deed enjoined, upon the ground that the premises sold were and are the homestead of the plaintiffs. The defendants answered, denying that said premises were the homestead of the plaintiffs at the time the indebtedness for which said judgment was rendered was incurred. A decree was rendered declaring that said judgment is not a lien upon said premises, and setting aside said sale; also, perpetually enjoining the sheriff from issuing a deed thereunder. Judgment was rendered against the defendants for costs. Defendants appealed.—*Affirmed* in part, and *reversed* as to other part.

J. J. Mosnat for appellants.

Tom H. Milner for appellees.

GIVEN, J.—I. The facts necessary to be noticed are, in substance, as follows: Plaintiffs were for many years residents of Belle Plaine, Iowa, and for nineteen years preceding April, 1893, occupied a certain house and lot in that town as their homestead. On November 1, 1892, Mr. Blue purchased the lot in question, situated in said town, for one thousand and fifty dollars, and thereafter sold an old house thereon for one hundred and forty dollars, which house was removed from the lot
1 prior to February, 1893. About the first of March, 1893, Mr. Blue commenced excavating upon said lot for the purpose of erecting a new house, and proceeded with the construction of the house to completion. The house being then just completed, the plaintiffs, with their family, moved into it on October

3, 1893, and have ever since occupied the premises as their homestead. April 10, 1893, Mr. Blue sold the house and lot then and theretofore occupied as a homestead for one thousand, two hundred dollars, and gave possession to the purchaser about May 10, 1893; he and his family then moving into a house rented by the month, to remain therein until the new house was completed. On leaving the old home, plaintiffs removed some wood, coal, garden tools, a bench, and two or three old chairs, to a woodshed on the new premises, the remainder of their household goods being taken to the rented house, where only such parts as were necessary were unpacked and used. During the construction of the new house, plaintiffs and their children were frequently on the premises; the plaintiffs inspecting the work, and their son assisting, to a limited extent, in painting the house. Plaintiffs also cultivated the garden ground on the new premises for the use of the family. Plaintiffs paid for the lot in question, and the construction of the house, between three thousand seven hundred dollars and three thousand, nine hundred dollars; using for that purpose the one thousand, two hundred dollars received from the sale of the old homestead, the one hundred and forty dollars received from the sale of the old house, two hundred dollars claimed to have been contributed by Mrs. Blue from her own money, four hundred and seventy dollars of borrowed money, and the balance from the business of Mr. Blue. For a number of years prior to 1893, Mr. Blue had been engaged in the mercantile business at Belle Plaine, and was a frequent purchaser of goods from Louis Heilprin & Co., who were wholesale dealers in Chicago, Illinois. On June 9, 1893, Mr. Blue gave an order to said firm to "please make and send" to J. D. Blue, eighty-seven cloaks, of specified kinds and prices, aggregating eight hundred and twenty-nine dollars and

twenty-five cents. Under date of August 4, 1893, Mr. Blue wrote the firm: "Do not ship my cloaks as early as Aug. 15th. I shall not want them before Sept. 10-15, unless the weather changes very much. I may be in Chicago at that time. However, I will notify you when to ship." The cloaks were shipped September 14, 1893, and received by Mr. Blue, and put into his stock for sale. This sale of cloaks was upon the usual terms of credit, with six per cent. discount for payment in ten days, and five per cent. for payment in thirty days. On January, 11, 1894, Mr. Blue transferred all his stock of merchandise, including the cloaks unsold, to the First National Bank of Belle Plaine, and to Etta Morton, to secure his indebtedness to them, and, as further security, gave to said bank a mortgage for one thousand, five hundred dollars on the premises in question.

II. We first notice the provisions of the following sections of the Code of 1873: Section 1988 provides: "Where there is no special declaration of the statute to the contrary, the homestead of every family, whether owned by the husband or wife, is exempt from judicial sale." Section 1992 declares: "The homestead
2 may be sold on execution for debts contracted prior to the purchase thereof, but it shall not in such case be sold except to supply the deficiency remaining after exhausting the other property of the debtor liable to execution." Section 2000 authorizes the owner to change the limits of the homestead, or to "change it entirely," with the concurrence of the husband or wife. Section 2001 provides that "the new homestead, to the extent in value of the old, is exempt from execution in all cases where the old or former homestead would have been exempt, but in no other, nor in any greater degree." There is no question that the plaintiffs have acquired a homestead right in the new premises, but the contention is whether they

acquired it before or after the debt for which judgment was rendered was contracted. If the debt was contracted when the order for the cloaks was given, it was contracted June 9, 1893; but, if not until the shipment was made, then it was September 14, 1893. Plaintiffs contend that they acquired a homestead right in the new premises when they commenced the construction of the house, in February or March; and, if not, that they certainly acquired it immediately upon disposing of their old homestead, April 10th. The defendant contended that the homestead character did not attach to these premises until the family moved into the new house, October 3, 1893. Such being the contentions, we need not determine at which date the indebtedness was incurred; for, if plaintiff's contention is to prevail, it was after the homestead right had attached; and if defendants' it was before. There are two ways in which plaintiffs could acquire a right of homestead in these premises, namely, by purchase, or by change of homestead. By purchase, as where the purchaser, having no other homestead, purchases and occupies as a homestead, or purchases with funds not derived from another homestead, and occupies as his homestead. By change of homestead, under section 2000, by changing the old for a new homestead, or purchasing the new with the proceeds of the old. The purpose of the law is to preserve to the family the home which it may have. While land constitutes a part of the homestead, the law contemplates the presence of a dwelling place, and land alone never constituted a homestead. It is conceded that mere intention to occupy as a homestead does not give the homestead right, and that there must be occupation as well as such intention. We have seen that the old house was removed from these premises before the construction of the new was commenced, and before the old homestead was sold. At those dates this was a vacant

lot, without a house to which the right could attach as an original acquisition of the homestead. If Mr. Blue, having no homestead, had purchased this lot, with the intention of erecting a house thereon, and making it his homestead, the homestead right would not have attached until the premises were occupied as such. Plaintiffs contend that they had such occupation of the new premises as to have made it their homestead from April 10th, and rely upon *Neal v. Coe*, 35 Iowa, 407, as supporting this claim. In that case the property purchased by the defendant as a homestead had a dwelling house and barn thereon, into which the purchaser removed his household furniture, with the intention of occupying the property as his homestead. Desiring to have the house repaired, he and his family lodged and boarded temporarily elsewhere during the progress of the repairs. It was while the house was thus occupied, and the repairs being made, that the plaintiff, with full knowledge of the facts, and of Coe's intention, loaned him the money for which the judgment was rendered. In that case there was a dwelling house to be occupied, and it was occupied as fully as the circumstances would admit, while in this there was no dwelling house to be occupied. We do not think that it should be said, under the facts, that there was such occupation of these premises as that, independently of a change of homestead, the homestead character had attached before the occupation of the house, October 3, 1893.

III. We have seen that plaintiffs, being the owners of a homestead, could, under section 2000 "change it entirely." There is no doubt that it was the intention of the plaintiffs from the time they sold their old homestead to improve and occupy these premises as their future home, and that, in furtherance of that purpose, they constructed the new house, and have occupied the place. Now, while the right of homestead will not

attach to vacant land acquired by purchase, independently of a change of homestead, it will attach to vacant land exchanged for a homestead, or bought with the proceeds of the homestead, when held in good faith for use as a home. See *Mann v. Corrington*, 93 Iowa, 108. In that case it is said: "It is well settled that as a general rule a mere intention to occupy property as a homestead does not give it the character of a home-

stead before it is actually occupied for that purpose. * * * But that rule applies especially to the original acquisition of a homestead. It is not of universal application to a new homestead acquired in exchange for the old one." In the case of changes of homestead, the law follows and protects the proceeds of the old into the new homestead, and preserves the homestead as a continuing right. It seems to us quite clear that this was a change of homesteads, and that under the authority of *Mann v. Corrington*, *supra*, and the cases therein cited, we must hold that the homestead character attached to this property from the time that the plaintiffs disposed of their old homestead. Thus viewed, it is clear that the debt for which the judgment was rendered was not contracted prior to plaintiff's acquisition of the homestead right in this property; but it is also clear that the property is not exempt from that debt, except to the extent in value of the old homestead, as provided in said section 2001. Defendants' judgment was a lien subject to the homestead right, and therefore the court erred in decreeing otherwise; but as it does not appear that the execution sale was to supply a deficiency remaining after exhausting the other property of the debtor, and does appear that the property was sold without regard to the homestead right, the decree is correct in so far as it sets aside the sale and enjoins the issuing of a deed thereon. The statute, in such a case as this, exempts only to the

extent in value of the old homestead; and therefore the other items which entered into the payment for the property cannot be considered, to enlarge the exemption. The decree is reversed in so far as it holds that the defendants' judgment is not a lien, and it is affirmed in so far as it sets aside the execution sale, and enjoins the issuing of a deed thereon. The case will be remanded for a decree in harmony with this opinion.—**AFFIRMED** in part, and **REVERSED** in part.

E. B. FULLIAM, J. D. FULLIAM, SULTANA BARTLETT and
ELIZA J. BOND, Appellants, v. M. D. DRAKE, H. E.
WILEY, Sheriff of Muscatine County.

105	615
105	525
105	615
123	701
105	615
143	263

Judgment: *OPENING: Law and equity.* A judgment is conclusive
2 as against parties thereto unless grounds exist for a new trial or
for equitable interference.

REVIEW IN EQUITY. Questions which have been adjudicated in a
court of law having jurisdiction of the subject matter and the
2 parties cannot be reviewed by the defeated parties by a suit in
equity, since under Code, 1873, section 2522, and also independent
of statute, equity has no power to review or correct errors in a
proceeding at law.

COLLATERAL ATTACK. A judgment awarding an execution against
1 certain real estate belonging to a decedent's estate is conclusive
4 as against the heirs who were parties thereto, that all the neces-
5 sary parties were before the court, although they did not plead a
defect of parties, and they cannot collaterally attack the judg-
ment upon the ground that certain other heirs were not served.

VACATION: Parties. A demurrer to a petition for a retrial to vacate
an order under Code, 1873, section 3092, awarding an execution
3 against certain real estate belonging to decedant's estate is prop-
erly sustained where some of the parties to the original proceed-
ings are not parties to the application to vacate.

Appeal from Muscatine District Court.—HON. W. F.
BRANNAN, Judge.

FRIDAY, MAY 20, 1898.

Suit in equity to enjoin a sale of real estate under execution, and to set aside and annul certain proceedings wherein defendant M. B. Drake was awarded execution against the property of George W. Fulliam, deceased. The trial court sustained a demurrer to the petition, and denied the injunction asked, and plaintiffs appeal.—*Affirmed.*

Richman & Richman for appellants.

Jayne & Hoffman for appellees.

DEEMER, C. J.—In 1874, F. A. Drake recovered a judgment against George W. Fulliam for the sum of eight hundred dollars. Fulliam died in the year 1893, leaving eight children as his only heirs. Four of these children are the appellants in this action. M. B. Drake became the owner of the judgment by assignment, and after the death of Fulliam she commenced proceedings, under section 3092 of the Code of 1873, asking the court to award her execution against certain real estate which she claimed belonged to George W. Fulliam, at the time of his death. She made all the heirs parties to this proceeding, but it is now claimed that but two of them, to-wit, J. D. Fulliam and E. B. Fulliam, in addition to J. D. Fulliam as administrator of the estate, were served with notice or appeared to the proceedings. In that action the court, after hearing the evidence adduced upon the issues as tendered, awarded the execution as prayed. The defendants therein appealed to this court, where the order was affirmed. See *Drake v. Fulliam*, 98 Iowa, 339. After the affirmance, execution issued and was levied upon the real estate described in the order, and this action was brought to restrain further action upon the execution, and to set aside the order awarding the execution, upon the ground that the court

which awarded it was without jurisdiction because all the owners of the property were not made parties defendant to the proceeding, because the original judgment was not a lien upon the premises, and for the further reason that the appellants herein showed an independent record title in themselves. It is also claimed that the enforcement of the order will deprive plaintiffs of their property without due process of law. It is further alleged that E. B., J. D., and S. J. Fulliam are the owners and in the present possession of the property. The petition reciting these facts, as well as some others which we do not regard as controlling, was presented to the trial court for the allowance of a temporary writ of injunction. Appellee Wiley alone appeared to the proceedings, and filed a demurrer to the petition based upon the ground that plaintiffs were not entitled to the relief demanded, because of defect of parties, plaintiffs, and defendants, and one other ground not necessary to be stated. This demurrer was sustained, and the temporary injunction asked for denied.

The real parties in interest in this controversy were parties to, served with notice of, and appeared in the special proceedings for award of execution. In that action these plaintiffs denied that George W.

- 1 Fulliam died seized of any part of the real estate against which award of execution was asked, and alleged that they, with S. J. Fulliam, owned the said real estate. They also pleaded some other defenses not necessary to be mentioned. They did not plead, however, that the other heirs were not served with notice and did not appear to the petition. On the contrary, the record of the court made upon the hearing of the application recites that all the defendants appeared by attorneys Hanley & Detwiler, and introduced
- 2 their evidence. That E. B. and J. D. Fulliam are concluded by what was in fact adjudicated in that proceeding is clear, and this adjudication is final,

unless grounds exist for a new trial or for equitable interference. That they are also bound as to all matters which should have been pleaded in defense to that, unless facts appear justifying a re-trial, or unless, as claimed by appellants, the court which awarded the execution was without jurisdiction, is equally clear. These propositions are so elementary as not to need the citation of authorities in their support. It is manifest that this is not an application, either at law or in equity, for a re-trial. If it were, it should not
3 be granted, for the reason that the parties to the original proceeding are not all made parties to this suit, and some of the persons made parties to this suit were not parties to that. Treating this case, then, as an application for a re-trial to vacate or reverse the original order, under sections 3154 to 3162, inclusive, of the Code of 1873, the appellees' demurrer to the petition was properly sustained, because of non-joinder of proper parties. If this be, as we think it is, an original suit in equity to enjoin the enforcement of an order because the court making it was without jurisdiction, we then have the question, were appellants entitled to the relief demanded?

Appellants insist that the court had no jurisdiction to make the award—First, because but two of the eight heirs were served with notice of the proceeding; second, because the judgment was not a lien upon the real estate against which execution was awarded; and, third, because the record title to the real estate was not in George W. Fulliam at the time of his death.

From the statement we have heretofore made of the issues tendered in the special proceedings, it will be seen that the second and third grounds of the objection to the jurisdiction of the court were pleaded
4 in defense to that proceeding, and were adjudicated against the appellants in the order granted by the court. Having been so adjudicated, they cannot

be reviewed by a suit in equity, as a court of equity has no power to review or correct errors in a proceeding at law. See Code 1873, section 2522. This is the rule independent of statute. 1 High, Injunction, section 226.

The court which awarded the execution had jurisdiction of the subject-matter and of the only parties in interest who now claim that there was error in the proceedings, and to grant them the relief asked because of the matters now under consideration would be converting a court of equity into a court for the correction of errors.

The only remaining point made by appellants is that the court was without jurisdiction to make the order because the heirs of George W. Fulliam were not all served with notice of the application. Conceding, for the purpose of the case, that the order finding that all the parties appeared may be contradicted, we are still confronted with this state of facts: All of the petitioners in this case who have any interest in the land were served with notice of, and appeared to, that
5 application. They did not, it is true, plead a defect of parties. Nor does the record show that they raised the question in any manner. The inquiry here arises, was it necessary to do so? The general rule, subject to some exceptions, is that a judgment is conclusive, not only as to all matters actually in issue, but as to those which might or should have been alleged in the pleadings. *Donahue v. McCosh*, 81 Iowa, 296; *Hanson v. Manley*, 72 Iowa, 48; *Foster v. Hinson*, 76 Iowa, 714; *Keokuk Gas Light & Coke Co. v. City of Keokuk*, 80 Iowa, 137. The case must be treated, then, as if the court decided in the original proceedings that all the necessary parties were before it. This may have been an erroneous decision, but it does not follow that the court had no right to decide because all of the parties were not before it. It had jurisdiction of the

subject-matter; that is to say, the award of execution against the property of one deceased. It also had jurisdiction of all the persons who are parties to this suit having any interest in the land. Having this jurisdiction, it had the right to decide, as it did, that execution should be awarded. As we have said, an erroneous decision is not ground for relief in equity. See authorities heretofore cited and *Reed v. City of Muscatine*, 104 Iowa, 183; *Milne v. Van Buskirk*, 9 Iowa, 558. In the case of *Coe v. Anderson*, 92 Iowa, 515, we held that a question as to defect of parties is not jurisdictional, and that such a defect is waived unless assailed by demurrer, or possibly by answer or reply. See, also, *Bouton v. Orr*, 51 Iowa, 473. All matters complained of in this suit were adjudicated in the original proceeding, and the trial court correctly ruled that appellants were not entitled to the relief demanded.—**AFFIRMED.**

WATERMAN, J., took no part.

EDWARD POOLE V. EMMA BURNHAM, Appellant.

Husband and Wife: CONTRACTS BETWEEN: Distributive share. Code, 1873, section 2203, providing that, when property is owned by either the husband or wife, the other has no interest therein which can be the subject of a contract between them, applies to both personal and real property, so that an agreement, by the husband, relinquishing all claim to the separate personal property of his wife, is of no effect to bar his obtaining his distributive share in the estate of his wife.

Appeal from Des Moines District Court.—HON. JAMES D. SMYTH, Judge.

FRIDAY, MAY 20, 1898.

THE defendant, Emma M. Burnham, is the executrix of the last will and testament of Mary M. Poole,

105	620
128	122
105	620
132	611
105	620
134	214

deceased, who died, leaving plaintiff as surviving husband. Mary M. Poole died, leaving an estate of about eighteen thousand dollars, consisting entirely of personal property. She died, testate, leaving to her husband a bequest of one hundred dollars in lieu of all statutory provisions in his favor. The executrix tendered to plaintiff the amount given him by the terms of the will, which he declined, and institutes this proceeding, asking an order requiring the executrix to pay over to him one-third of the estate, as his distributive share under the law. In resistance, the executrix pleads a relinquishment in writing made during the life of Mary M. Poole, in words as follows: "Burlington, Iowa, July 3, 1893. In consideration of one dollar and divers other good and sufficient considerations, I do hereby agree with my wife, Mary M. Poole, that I will and do hereby relinquish all claim to any portion of her separate estate, and, in case she dies before I do, to make no claim to any property she may leave, except such provision as she may make for me in her last will and testament, and that I will take under such will, and will not in any manner contest the same, nor do anything to avoid the full operation thereof, as she in her best judgment may direct. [Signed] Edward Poole. Witnesses to signature: F. W. Brooks, John J. Fleming." This instrument was signed by Edward Poole. The district court adjudged plaintiff entitled to a distributive share of the estate, and ordered distribution accordingly. The defendant appealed.—*Affirmed.*

Smyth & Lewald and *Blake & Blake* for appellant.

C. L. Poor for appellee.

GRANGER, J.—I. The case presents the single question whether husband and wife can contract as to the distributive share of the husband in the estate of the

wife. That the written relinquishment set out is such a contract, there is no room for dispute. The question turns upon the construction to be placed on section 2203 of the Code of 1873, as follows: "When property is owned by either the husband or wife, the other has no interest therein which can be the subject of contract between them, or such interest as will make the same liable for the contracts or liabilities of either the husband or wife, who is not the owner of the property, except as provided in this chapter." This section has received consideration at the hands of this court. That prior to the adoption of the statute in question, husband and wife could contract as to the dower right of the wife, is settled in *Blake v. Blake*, 7 Iowa, 46, and *Robertson v. Robertson*, 25 Iowa, 350. The section in question became the law in 1873, at the adoption of the Code. Prior to the Code of 1873, it was the law, as declared, that the husband might by will dispose of his personal property, regardless of the distributive share of his wife surviving him. In *re Davis' Estate*, 36 Iowa, 24. Such, however, was not the rule as to real property. By the adoption of the Code of 1873, the rule as to personal property was changed, so that the husband could not, by will, dispose of the distributive share of the widow as to either class of property. *Ward v. Wolf*, 56 Iowa, 465. After referring to these cases, appellant urges that the agreement or relinquishment, by Edward Poole, is not prohibited by section 2203 of the Code of 1873, because it was not intended to apply to personal property. In *Linton v. Crosby*, 54 Iowa, 478, it is said, speaking of the section: "This provision relates to the interest which a husband or wife holds in the lands owned by his or her spouse which arises under the marriage relations. It does not refer to a property interest that may be based upon contract, or may be derived from sources other than the marriage relation. The

section evidently contemplates and includes in its language the dower estate. Upon the marriage relation this estate is based." The language used was not intended as a limitation of the operation of the section to lands merely. The contract involved in that case was one in regard to lands, which is the reason for the expression being limited to that class of property. At the time that case was determined, the law, as to the right of husbands to bequeath personal property, to the prejudice of the wife's distributive share, was the same as it is now, and the language could not have been influenced by consideration of a different rule applicable to real and personal property. It will be seen that the language of the section is as applicable to one class of property as another. The language is: "When property is owned by either husband or wife, the other has no interest therein that can be made the subject of contract between them." The *Linton-Crosby Case* was followed in *re Lemon's Estate*, 58 Iowa, 760, which is also a case regarding real estate. It is thought that the distributive share is not a property interest, so as to come within the statute; and reference is made to *Martin v. Martin* 65 Iowa, 255. The case, so far as it has application, supports our view. It is with reference to alimony and the right of husband and wife to contract as to it, and the right is sustained, holding that section 2203 was not applicable; but it is said: "If, by virtue of her right to alimony, she has a right or property interest in his estate, it is clear she cannot divest herself of that right or interest by contract with him." It is then said that the right of alimony does not create an interest in the husband's property. That a dower interest does, see *Buzick v. Buzick*, 44 Iowa, 259.

II. It is thought that the section only applies when the subject of the contract is some present existing interest in the property of either husband or wife.

Such a construction would not meet the evident purpose of the law. The test is, is the property the subject of the contract, and owned by the husband or wife? It makes no difference when the contract was made. The rule is that property of the character stated in the law cannot become the subject of the contract. Property obtained after the contract is made can as well become the subject of it as if then in existence, if the parties so intend. As to property of the character we are considering, as soon as it is owned by husband or wife, the law forbids that it shall become the subject of such a contract, regardless of when the contract was made. Property becomes subject to a contract when the contract affects or controls it as the parties intended. The judgment of the district court is **AFFIRMED**.

BLOCK & POLLAK IRON COMPANY, Appellant, v. THE HOLCOMB-BROWN IRON COMPANY, P. M. JOYCE; H. G. HAMILTON, B. M. CAMPBELL, M. T. EVENS, RICHARD BROWN, J. F. HOLCOMB, J. J. FLEMING, Trustee, Appellees.

Evidence: INNOCENT PURCHASER: *Burden of proof.* The burden of proving that one is an innocent purchaser of real estate without notice of prior equities is originally upon the purchaser, but when he has proved his purchase and payment for the land, the *onus* is shifted to the person asserting the encumbrance, to show notice thereof, either express or implied, to the purchaser.

RULE APPLIED: *Lien on equitable title.* Where certain land, the equitable title to which was in a judgment debtor, had been, previous to the rendition of the judgment in question, conveyed by the holder of the legal title, in trust, to secure the payment of certain indebtedness of the equitable owner, and had, subsequently thereto, and after the satisfaction of such trust, been conveyed by the legal owner and such trustee to the grantor of the promoters of a certain corporation, to whom it was conveyed by him in good faith, in consideration of a certain amount of stock of such corporation, without notice of such equitable ownership on the

part of the judgment debtor, or of the fact that the judgment creditor claimed a lien thereon, such subsequent purchasers were entitled to protection as against such judgment creditor.

Appeal from Des Moines District Court.—HON. JAMES D. SMYTH, Judge.

SATURDAY, MAY 21, 1898.

SUIT in equity to declare a judgment held by plaintiff a lien upon certain lands, the legal title to which is in defendants Joyce, Hamilton, Campbell, and Evans, and to subject said land to the payment of the judgment. Defendants deny that plaintiff's judgment was ever a lien upon the property, deny that the defendants in judgment ever owned or had any interest in the land, and further plead that they are innocent purchasers for value. The trial court dismissed the petition, and plaintiff appeals.—*Affirmed.*

Smyth & Lewald for appellant.

E. S. Huston for appellees.

DEEMER, C. J.—The defendant in judgment is the Holcomb-Brown Iron Company. It never had legal title to the lands. Claim is made that it at all times was the equitable owner, and that plaintiff's judgment is or should be made a lien thereon. John F. Holcomb held the legal title from January 27, 1891, to June 3, 1892, when he conveyed to Fleming as trustee. This deed was made to secure about four thousand dollars of the indebtedness of the Holcomb-Brown Iron Company to Richard Brown, the National State Bank, and others. In May of 1894, Holcomb quit-claimed the property to Brown, and Fleming, trustee, conveyed to him, June 12, 1894, by special warranty deed reciting that Holcomb had conveyed, and requested him to; and, the

trust being satisfied, he accordingly did so. On June 23, 1894, Brown conveyed to Joyce, Hamilton, and others, the expressed consideration being thirty thousand dollars. This was paid by the delivery of thirty thousand dollars of stock in the Western Iron & Steel Company to Brown. The grantees in the Brown deed were promoters of this last-named company, which is a corporation. Appellant's judgment was rendered March 3, 1894.

We are satisfied that Holcomb held the property in trust for the benefit of the Holcomb-Brown Company, and that the conveyances to Fleming, trustee, and to Brown, were made to secure the creditors of that corporation, among whom were the National State Bank and Brown himself, who, it appears, had made large advancements to the corporation. We are further convinced that Brown conveyed to Joyce and others, in consideration of thirty thousand dollars in stock in the Western Iron & Steel Company, and that, while he may have held the property in trust, yet, when appellees purchased, the records disclosed absolute title in Brown, and that the trust impressed upon the land by the conveyance to Fleming had been discharged. It is clear that when Holcomb conveyed to Fleming as trustee there was no lien upon the land, and, as this conveyance was made for the benefit of the bank, Brown, and others, the conveyances by Holcomb and Fleming, the trustee, were in execution of that trust, and related back to the making of the original trust deed. Brown's interest was, therefore, prior and superior to the lien of plaintiff's judgment, conceding such judgment to have been a lien from the time of its rendition.

As no question is made regarding the *bona fides* of the indebtedness to the bank or to Brown, it is clear that Brown, if he held the title, would be entitled to

have his claim, whatever it may be, preferred over that of the appellant. *Agency Co. v. Bush*, 84 Iowa, 272. But, as Brown knew that the property belonged in equity to the Holcomb-Brown Iron Company, when he took his conveyance, the appellant's judgment, when recovered, would, as to him, be a lien upon the property. When appellees Joyce, Hamilton, and others purchased the property the records showed the legal title to be in Brown. A judgment rendered against the Holcomb-Brown Iron Company while Brown held the legal title would not be a lien against the property in such sense as to charge subsequent *bona fide* purchasers without notice. *Hultz v. Zollars*, 39 Iowa, 589; *Stadler v. Allen*, 44 Iowa, 198. Campbell, Evans, and Hamilton each testified that he did not know of plaintiff's claim or judgment, and did not know that the Holcomb-Brown Company ever owned any interest in the property, or made any claim thereto. Joyce withdrew his appearance, and default was entered as to him; but there is no showing of any knowledge on his part of appellant's claim, or of the equitable ownership of the Holcomb-Brown Company. In the case of *Bank v. Fletcher*, 44 Iowa, 252, it is said: "Whoever purchases real property of the person holding the legal title, and takes a conveyance of the property without notice of outstanding equities, and pays a valuable consideration, takes it divested of such equities, and, of course, of all liens on such equities." The conveyance to Joyce and others was evidently in trust for the corporation of which they were promoters, and this corporation is now the beneficial owner of the property. There is no evidence of notice to any of these promoters,—indeed, the contrary appears,—and no evidence that the corporation had any notice whatever. "While, as a general rule, the burden of proving that one is an innocent purchaser without notice of prior equities is upon the purchaser,

yet, when the subsequent purchaser has proved his purchase, and payment for the land, the *onus* is shifted to the person asserting the equity or incumbrance to show notice thereof to the purchaser; that is, either actual notice or knowledge of such facts as would put an ordinarily prudent man upon inquiry, which, if followed up, would have led to the discovery of the equity or incumbrance." Jones, Real Property, section 1526, and cases cited. Appellant has entirely failed to produce such evidence, and defendants' title should be protected.—AFFIRMED.

DORCAS W. GREEN V. THE EQUITABLE MUTUAL LIFE
& ENDOWMENT ASSOCIATION OF WATERLOO, IOWA,
Appellant.

Corporation in Foreign State: SERVICE OF SUMMONS. A power of attorney executed by a foreign corporation in attempted compliance with North Dakota compiled laws, section 8192, requiring foreign corporations to appoint an agent residing at some accessible point, duly authorized to accept service of process and upon whom service of process may be made with the same effect as upon the corporation, is sufficient to render service upon the agent named therein binding upon the corporation without his acceptance thereof, although the power, in terms, merely authorize the agent to accept and acknowledge the service of process and did not expressly authorize service to be made upon him without his acceptance.

SAME. Where a foreign insurance company appoints an agent in a state, and did business therein, it is conclusively presumed to have assented to a statute providing that, when such company ceased to do business in such state the agent last designated by it to receive service shall be deemed to continue as its attorney for such purpose.

SAME. It is competent for a state to require foreign corporations to appoint an agent or attorney upon whom service of process may be made as a condition of doing business in the state.

CONSTRUCTION OF STATUTE. Where the laws of another state provide in one statute that no foreign corporation shall do business therein without having an authorized agent or agents on whom process

may be served, and in another statute that a foreign insurance
3 company shall, before doing business, appoint the commissioner
of insurance to be its agent for service, but does not make the
latter statute exclusive, service on an agent of a foreign insurance
company appointed under a foreign statute will confer jurisdiction.

SUMMONS: *Jurisdiction.* Where the statutes of a foreign state do not
in terms require that the summons shall state the time and place
6 to answer, and the summons in question did not furnish such
information, a judgment rendered on default of defendant's appear-
ance presupposes that such summons was sufficient under the laws
of such state, and the judgment will not be deemed void for want
of jurisdiction.

EVIDENCE: *Judgment.* The rule that a court of a general jurisdiction
will be presumed to have jurisdiction for the purposes of the judg-
1 ment which it renders does not apply to a judgment of a foreign
corporation which did not appear in the action, unless it is shown
that it submitted itself to the jurisdiction of the courts of the
state.

STATUTES: *Plea and proof.* Statutes of another state need not be
pleaded where they are merely evidence of ultimate facts as, for
instance, where the statutes of another state relating to the man-
2 ner of acquiring jurisdiction of foreign corporations are relied upon
to sustain an averment of the due rendition of a judgment against
such a corporation and to rebut evidence that the judgment was
rendered without jurisdiction.

Contract: PRESUMPTIONS: *Corporation in foreign state.* A contract
of insurance is presumably enforceable in the state under whose
7 laws it was issued, even if the insurer is a foreign corporation.

Appeal from Black Hawk District Court. —HON. A. S.
BLAIR, Judge.

SATURDAY, MAY 21, 1898.

ACTION at law on a judgment rendered by a district
court in the state of North Dakota. At the close of the
evidence the plaintiff asked the court to direct a verdict
in her favor, which was done, and a verdict was returned
as directed, upon which a judgment was rendered in
favor of the plaintiff. The defendant appeals.—
Affirmed.

Boies & Boies for appellant.

F. C. Platt for appellee.

ROBINSON, J.—The defendant is a corporation organized and existing by virtue of the laws of this state. The plaintiff seeks to recover the amount of a judgment which was rendered by the district court in and for Cass county, in North Dakota. The action in which the judgment was rendered was commenced by the issuing of a summons directed to the defendant, and served in Cass county upon A. L. Carey, who is stated in the return of the officer who served the summons to have been “agent, for service of process, of said defendant.” There was no other service of notice of the action, and no appearance thereto by the defendant. The chief contention of the defendant is that service of the summons on Carey was unauthorized, and that the court which rendered the judgment did not have jurisdiction to render it.

I. The petition alleges that the judgment in question was rendered on the nineteenth day of March, 1895, and that the court which rendered it “was a common-law court, having general jurisdiction.” A copy of the record of the court, which set out the summons and the return thereon, the appointment of Carey as agent of the defendant, the complaint, and the judgment, was attached to the petition in this case. The complaint sought a recovery on a certificate of membership alleged to have been issued on the twenty-seventh day of December, 1892, by the defendant to the plaintiff, and averred that the application for the certificate was made and signed by the plaintiff, in the city of Fargo, in North Dakota, where the plaintiff then resided; that by the certificate she became a member of the accident department of the defendant; that in June, 1893, in the state

of Pennsylvania, she sustained a bodily injury, in consequence of which she became, by the terms of the certificate, entitled to receive thereon from the defendant the sum of one thousand, three hundred dollars. Judgment for that sum, with interest, was demanded. The complaint shows that the defendant was a corporation of this state, and the judgment entry shows that it

did not appear in the action. It is contended by
1 the appellant that as the record of the case in the North Dakota court shows that the defendant therein was a non-resident of that state, and that it did not appear in the action, the ordinary presumption that a court having general jurisdiction has jurisdiction in a case in which it renders judgment does not apply, and that the burden is upon the plaintiff to show affirmatively the facts which conferred upon the court jurisdiction of the defendants. It is contended, further, that Carey was not the agent of the defendant when the summons was served upon him, and that the summons was defective, and the service thereof insufficient to confer jurisdiction of the defendant upon the court. In the case of *Galpin v. Page*, 18 Wall. 350, facts necessary to show the jurisdiction of courts in different cases were considered, and it was said: "Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant against whom a personal judgment or decree is rendered was at the time of the alleged service without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree. * * * When, therefore, by legislation of a state, constructive service of process by publication is substituted in place of personal citation, and

the court upon such service is authorized to proceed against the person of an absent party, not a citizen of the state, nor found within it, every principle of justice exacts a strict and literal compliance with the statutory provisions. * * * But where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction, upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear, in such cases, upon the record." The statement of the law quoted is well supported by the authorities, and appears to us to be correct. See *Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137 (11 Sup. Ct. Rep. 512); *Black Judgments*, section 896; 12 Am. & Eng. Enc. Law, 272. The rule of law thus stated is applicable to corporations, as well as to natural persons. *St. Clair v. Cox*, 106 U. S. 350 (1 Sup. Ct. Rep. 354); *Black Judgments*, section 910. But it is claimed that, although the rule applies to cases in which the court acquires jurisdiction only by publication, it does not apply to a foreign corporation which voluntarily submits to the jurisdiction of the court for the purpose of transacting business within the state in which the court is held. That may be true when it appears that the foreign corporation has submitted itself to the jurisdiction of the courts as stated, but the rule that a court of general jurisdiction will be presumed to have jurisdiction for the purpose of rendering the judgment which it enters does not apply to a foreign corporation which has not appeared to the action, until it is shown that it has submitted itself to the jurisdiction of the courts of the state.

II. The authority which the defendant gave to Carey, upon which the plaintiff relied in causing the

summons to be served on him, was in the form of a power of attorney filed in the office of the commissioner of insurance for the state of North Dakota, which contained the following: "Know all men by these presents, that the Equitable Life and Endowment Association of Waterloo, in the state of Iowa, do hereby nominate and appoint, for themselves and their successors, the following-named person, to-wit, Hon. A. L. Carey, of the city of Bismarck, * * * as the true and lawful agent or attorney of said company in the state of North Dakota. And the said company do hereby authorize the aforesaid named person to accept and acknowledge service of process for and in behalf of said company in said state; consenting that such service of process, mesne or final, upon such attorney, shall be taken and held to be as valid as if served upon the company according to the laws of said state, or any other state or territory, and waiving all claim or right or error by reason of such acknowledgment of service." No formal revocation of that power is shown or claimed. Carey did not acknowledge service of the summons, but it was served upon him. To show that the service made was authorized, and gave the court jurisdiction of the defendant, the plaintiff introduced in evidence portions of the constitution and statutes of North Dakota. A section of the constitution (section 136) thus introduced provides that "no foreign corporation shall do business in this state without having one or more places of business and an authorized agent, or agents, in the same upon whom process may be served." One of the sections (Comp. Laws, article 20, chapter 3, section 3190) of the statutes introduced provides that "no corporation created under the laws of another state shall transact any business within the state until it shall have filed in the office of the secretary of state a duly authenticated copy of its charter." Another section provides that "such corporation shall appoint an agent who shall

reside at some accessible point in this territory
* * * duly authorized to accept service of
process, and upon whom service of process may be
made in any action in which said corporation may
be a party; and service upon such agent shall be
taken and held as due service upon such corpora-
tion." It is shown that these provisions are
2 now in force in North Dakota. The defendant
objected to the introduction in evidence of the
portions of the constitution and statutes referred to,
and insists that they were erroneously introduced,
because not pleaded, and cites several cases decided by
this court in support of that claim. It is well settled
that this court cannot take judicial notice of the laws of
another state. *In re Will of Capper*, 85 Iowa, 82, and
cases therein cited. It was said in that case, of the laws
of the state of Indiana, which some of the parties to the
proceeding asked to have considered, that there was no
proof as to what those laws were, and that they "should
have been pleaded and proven on the trial, as required
by law"; but no attempt was made to state any general
rule applicable to the pleading of statutes. In *Carey v.*
Railroad Co., 5 Iowa, 357, it was said: "Our courts do
not take judicial notice of the statutes of another state,
and, if a party relies upon such statutes, he must set
them out,—plead them as he does any other fact; and it
will not do to refer to them by their title, and date of
approval, nor by stating what, in the opinion and judg-
ment of the pleader, are their general provisions and
requirements." What was thus said had reference to a
bill in equity to which a demurrer had been sustained,
and, although the statutes of Indiana which were
referred to in the bill were held not to have been prop-
erly pleaded, it was held, in effect, that the bill showed
a cause of action, and that the trial court erred in sus-
taining the demurrer. It is undoubtedly true that there
may be cases in which statutes relied upon must be

pleaded, but our system of pleading requires that the ultimate facts, and not the evidence of such facts, be pleaded. *Snyder v. Railway Co.*, 105 Iowa, 284; *De Lay v. Carney Bros.*, 100 Iowa, 687; *Robinson & Co. v. Berkey*, 100 Iowa, 136; *Luse v. City of Des Moines*, 22 Iowa, 590. It follows that, where statutes of another state relied upon are merely evidence of ultimate facts, they need not be pleaded. In this case the petition alleged the rendition of the judgment in question, and set out a copy of the record. That showed that the defendant was a non-resident of the state, and that it did not appear in the action. The defendant did not, however, question the sufficiency of the petition by motion or demurrer, but filed its answer, in which it denied the rendition of the judgment, although admitting that the transcript of the summons, and return thereof, of the judgment, and of the power of attorney which appointed Carey its agent, is correct, but denied that Carey had authority to represent the defendant, and denied that service of the summons on him was authorized. It does not deny that a true copy of the complaint is set out in the transcript. Under the issues as thus presented, it was not material that the statutes upon which the plaintiff relies had not been pleaded. She was entitled to introduce them in evidence to rebut the claim of the defendant that service of the summons upon Carey was not sufficient to give the court jurisdiction of the defendant, and to sustain the judgment rendered. See *Taylor v. Runyan*, 9 Iowa, 522; *Webster v. Hunter*, 50 Iowa, 215; Black Judgments, section 860. We conclude that proof of the constitutional and statutory provisions in question, including some to which we have not specially referred, were properly received in evidence.

III. One of the statutory provisions contained in the laws of North Dakota (Laws 1891, chapter 73, section 17), shown by the evidence, is as follows: "Any

insurance company, corporation or society not organized under the laws of this state shall not directly, or indirectly take any risks or transact the business of insurance in this state until it shall first appoint in writing the commissioner of insurance in this state to be the true and lawful attorney of such company in and for this state upon whom all lawful process in any action or proceeding against the company may be served with the same effect as if the company existed in the state. Said power of attorney shall stipulate and agree on the part of the company that any lawful process against the company which is served on said attorney shall be of the same legal force and validity as if served on the company and that the authority shall continue in force so long as any liability remains outstanding against the company in this state. * * *

Service upon such attorney shall be deemed sufficient service upon the company. * * *

As already shown, the summons was not served upon the commissioner of insurance. It is insisted by the appellant that where, as in this case, foreign corporations are obliged to comply with certain statutory requirements in order that they may do business within the state, the provisions which are designed to give the courts jurisdiction over them must be strictly followed; that the statute last quoted required service of summons to be made upon the commissioner of insurance, and, as it was not so served, jurisdiction of the defendant was not acquired. The only answer which need be made to that claim is that the statute last referred to did not make service upon the commissioner the exclusive method of serving process upon a non-resident corporation, but that another provision already referred to, provided for the appointment of another agent upon whom service might be made, and that method was followed in this case. See *Insurance Co.*

v. Highsmith, 44 Iowa, 330. That it is competent for a state to impose upon foreign corporations conditions like those in question, upon which they will be permitted to do business in the state, is well settled. *Sparks v. Association*, 100 Iowa, 458, and cases therein cited.

IV. Some claim is made to the effect that although Carey was an agent for the defendant, with power to accept service of mesne and final process, that power did not authorize the service of the sum
4 mons upon him especially as he did not accept service of it. In executing and filing the power of attorney which appointed Carey, it must be presumed that the defendant intended to comply with the law of the state which provided for the appointment of an agent upon whom process might be served. That law provided for the appointment of an agent authorized to accept the service of process, "and upon whom service of process might be made." The power of attorney executed and filed did not in terms state that service of process might be served upon Carey, but it appointed him the agent of the defendant for the purposes of service of process, and the language used does not in terms exclude the right of parties to serve process upon him. The defendant, having undertaken to comply with the statute, and having done business under the appointment of Carey which it filed, should not now be heard to say that by reason of technical defects the appointment made did not comply with the statute. *Gibson v. Insurance Co.*, 144 Mass. 81 (10 N. E. Rep. 729). It is said that the defendant had ceased to do business in North Dakota before the summons was served; therefore, that
5 service on Carey was not authorized. A statute of that state, however, provides that, where a company not organized in the state shall cease to do business therein, the attorney of the company last designated shall be deemed to continue the

attorney of the corporation, for the purpose of serving process for the commencement of any action for any liability accruing on its policies, while transacting business in the state, and that service upon such attorney shall be deemed service on the corporation. The defendant must be held to have assented to the provisions of that statute. The district court of North Dakota found that Carey was the agent of the defendant when the summons was served, and that the service thereof was effectual to give to the court jurisdiction of the defendant; and that finding appears to have been fully authorized, if the summons was itself sufficient.

V. It is said, however, that the summons was not sufficient, in that it did not state when or where the defendant was required to appear to the action. We do not find in the argument for the appellee any
6 answer to that claim. The summons notified the defendant that it was summoned and required to answer the complaint of the plaintiff, a copy of which was attached to the summons, and to serve a copy of its answer upon the subscriber, who was the attorney for the plaintiff in Fargo, within thirty days after the service of the summons, and that, if the complaint was not answered within the time stated, the plaintiff would take judgment for the sum of one thousand and three hundred dollars and interest. The notice would not have been sufficient, under the law of this state, to confer jurisdiction of the defendant upon the court. *Fernekes v. Case*, 75 Iowa, 152, and cases therein cited. The statutes of North Dakota (Comp. Laws 1887, section 4893) provide that civil actions in the courts of that state shall be commenced by summons; that "the summons shall be subscribed by the plaintiff, or his attorney, directed to the defendant, and shall require him to answer * * * within thirty days"; that from the service of the summons the court is deemed to have

acquired jurisdiction and to have control of all subsequent proceedings. The provisions of the statute of this state requiring the original notice to show the date when the petition will be filed, the court in which it will be filed, and the term at which the defendant is required to appear, are not found in the statutes of North Dakota. The court of that state which rendered the judgment in suit found that the summons served, and the service thereof, were sufficient; and nothing to justify a finding that the court erred in that respect is shown.

VI. The appellant argues that the court of North Dakota did not have jurisdiction to render the judgment in question, because at the time the action was commenced the plaintiff was not a resident of
7 that state. When she ceased to be a resident of North Dakota is not shown. The contract of insurance was issued under the laws of that state, and presumably was enforceable there. We find no reason for concluding that it was not.

Other questions discussed are not of sufficient importance to merit special mention. The facts upon which the plaintiff's right of recovery in this action depends are shown beyond well-founded controversy, and the judgment of the district court appears to be right. It is therefore **AFFIRMED**.

C. H. and L. J. McCORMICK V. HENRY HANKS, MARGARET HANKS, *et al.*, Appellants.

Executors and Administrators: **LIENS: Priorities.** The equitable lien which a judgment creditor establishes upon a devise to the
2 judgment debtor before the executor has taken steps to enforce the payment of notes due from the devisee to the estate, prevails over any interest which the executor may have to subject the devise to the payment of the notes.

105	639
115	147

105	639
120	426

105	639
132	666

CHARGES AGAINST DEVISEE. Notes executed by a son to his father in 1872 and 1873, which passed to his mother as sole legatee of his father on his death, in 1877, cannot, on the death of his mother, in 1895, in an action to subject his interest as devisee in her estate to a judgment, be considered valid obligations, where no attempt was made by his mother to enforce them during her lifetime, and her executor did not list or treat them as assets of the estate.

Advancements. The doctrine of advancements applies only to intestate estates and not to bequests or devises.

RULE APPLIED. Money paid by a testator to a devisee before the making of the will, and which is not mentioned therein, will be considered as a gift.

Appeal from Buena Vista District Court.—HON. LOT THOMAS, Judge.

SATURDAY, MAY 21, 1898.

PLAINTIFFS are judgment creditors of Henry Hanks, and they bring this action in equity to subject his interest in certain real estate to the payment of their claim. The decree below was in plaintiff's favor, and defendants appeal.—*Affirmed.*

Milchrist & Robinson for appellants.

A. D. Bailie for appellees.

WATERMAN, J.—Plaintiff's judgment was rendered November 9, 1876. Henry Hanks, by the will of his mother, who died December 4, 1895, obtained an interest in certain real estate, upon which said judgment is by this proceeding made an equitable lien, unless it be for the matters hereafter stated. Prior to the death of his mother, Henry Hanks deeded his interest in her estate to his sister and co-defendant Margaret A. Hanks. This deed was, however, claimed only as a mortgage, and it was so allowed by the trial court, and Margaret A. Hanks was given by the decree a first lien on the real estate in question for the amount of one hundred

and eighty-eight dollars and eighty cents, with interest thereon at six per cent. from December 14, 1896, and eighteen dollars and eighty cents attorney's fees. No exception was taken by plaintiffs to this finding, nor do they appeal therefrom. It is therefore final.

II. We come now to the next defense interposed. William Hanks was the father of Henry. He died September 19, 1877, making his wife his sole devisee. On

May 4, 1872, Henry Hanks executed to his father
1 a promissory note of that date, due in one year, for one hundred dollars, bearing six per cent. interest. Thereafter he executed another note, payable also to his father, bearing date April 1, 1873, running one year, for the sum of one hundred and seventy-five dollars, with six per cent interest; and on May 21, 1877, he executed this further instrument: "\$200.00. Storm Lake, Iowa, May 21, 1877. Received of William and Margaret Hanks \$200, to apply on final settlement of his estate. Henry Hanks." It is claimed that these instruments were valid obligations of Henry Hanks; that they passed to his mother by devise from his father; and that any interest he has in his mother's estate is subject, first, to pay these amounts. The various devisees are parties defendant herein, and this claim is made in their behalf.

III. We will first consider the question as to the two notes, for the receipt stands on a different basis. The facts of the case were nearly all stipulated. Those that are material, and which have not already been stated, are as follows: George, a brother of defendant Henry, is executor of the mother's estate. In his inventory of the estate he says that "the only personal property belonging to the estate was a small amount of household furniture, and same have been turned over to a daughter of deceased and \$300 in cash." The executor is one of the devisees. The notes were not.

listed or treated as assets of the estate, and it seems clear that they were never considered as liabilities of Henry Hanks until plaintiffs asserted their claim. There is another thought in this connection. The executor is, at most, but a simple contract creditor, while plaintiffs have established an equitable lien on the real estate. The interest of Henry Hanks was a devise. He took, not through the executor, but directly from decedent. Before any steps were taken by the executor to enforce payment of the notes, plaintiffs' lien had been established. Under the circumstances, we think plaintiffs' claim must prevail.

IV. As to the receipt, the claim made is that it was given as an advancement, and that the amount must be deducted from the share of Henry Hanks. But we think that the money, if any, evidenced by this receipt, must be considered a gift. The doctrine of advancements applies only to intestate estates. *In re Estate of Lyon*, 70 Iowa, 375; *Nettleton v. Nettleton*, 17 Conn. 542; *Coleman v. Smith*, 55 Ala. 368; *Green's Ex'r v. Speer*, 37 Ala. 532; *Brown, v. Brown*, 37 N. C. 309.

V. It was stipulated that the interest of Henry Hanks in the estate is worth seven hundred dollars, and subject to the lien of Margaret Hanks, the plaintiffs' lien thereon was established in the sum of four hundred and ninety-two dollars and forty cents, with interest at six per cent. from December 14, 1896. This is the amount due on the judgment. This action of the court is approved, and its judgment AFFIRMED.

NELSON BANNING V. JOHN A. PURINTON, and GEORGE D. FOSTER, Appellants.

Fraudulent Conveyance: EVIDENCE. The extent of the grantor's property, and amount of indebtedness, and the nature of his

106	642
111	295

105	642
132	110
132	498

- trouble with plaintiff at the time of the alleged fraudulent conveyance, were not shown. The conveyance, though to grantor's father-in-law, was based on a consideration, part of which went to pay a debt due grantor's wife, part was a note of the wife, and part the price of a lot conveyed by the grantee to the wife. *Held*, to be insufficient to show fraud.

ADVANCES AS CONSIDERATION. An agreement by a child to repay a father an amount advanced by the latter not as a gift but as an advancement is valid.

INSOLVENCY. To entitle a creditor to set aside a conveyance by a debtor as fraudulent he must establish the insolvency of the debtor.

SAME. It is not essential to the right of a creditor to attack a mortgage executed by the debtor, as fraudulent, that the debtor shall have been insolvent at or about the time of the execution of the mortgage if he was insolvent at the time the attack was made upon the conveyance, though the fact of his insolvency at the time of the execution of the mortgage may be relevant to the question of fraud.

Opening of Trial: DISCRETION. It is not an abuse of discretion to refuse to admit additional testimony after the trial has closed and the witnesses departed, where the failure to produce the testimony did not occur through oversight

Appeal from Jackson District Court.—HON. C. M. WATERMAN, Judge.

SATURDAY, MAY 21, 1898.

ACTION to foreclose plaintiff's mortgage, executed by John A. and Lydia A. Purinton. The defendant Foster alleged in his answer that he held judgments against John A. Purinton which were liens on the mortgaged property, that plaintiff's mortgage was fraudulent, and prayed it be declared inferior to the lien of his judgments. Decree for plaintiff, and defendant Foster appeals.—*Affirmed*.

Murray & Farr and *T. W. Darling* for appellant.

G. L. Johnson, D. A. Wynkoop, and A. L. Bartholomew for appellee.

LADD, J.—This action was begun May 31, 1895, to foreclose a mortgage on the east forty-seven feet of lot 3, in block C, in Preston, Jackson county, executed June 22, 1893, by John A. Purinton and wife to the plaintiff, to secure the payment of a note of one thousand and five hundred dollars. The defendant Foster recovered one judgment against John A. Purinton December 15, 1893, for the sum of two hundred and twenty-nine dollars and fourteen cents and costs, and another on May 21, 1895, for the sum of one thousand and six hundred dollars and costs. While these judgments are subsequent in time to the mortgage, the indebtedness was incurred prior thereto. The amended answer alleges that the real estate covered by plaintiff's mortgage is the only property of Purinton subject to execution, does not exceed in value the amount of the mortgage, and that the mortgage was executed for the purpose of hindering, delaying, and defrauding creditors.

I. The appellant insists that it is not necessary to establish the insolvency of Purinton in order to obtain the relief prayed. If the judgments may be satisfied from other property of the judgment defendant, there is no occasion for interference with the mortgage, or of invoking the intervention of a court of equity. *Gwyer v. Figgins*, 37 Iowa, 517; *Gorden v. Worthley*, 48 Iowa, 429; *Pearson v. Maxfield*, 51 Iowa, 76; *Miller v. Dayton*, 47 Iowa, 312. In these cases deeds were sought to be set aside, but the same rule applies with equal force to a mortgage. The latter may impede the collection of judgments quite as effectually as a deed, and, to obviate this, it is as necessary to set aside the one as the other. The jurisdiction of a court of equity in cases like this cannot be invoked by a creditor until his remedies at law have been exhausted. This rule does not prevail in all the states,

but is in harmony with the weight of authority. See 5 Enc. Pl. & Prac. 465.

II. Executions were not issued on the judgments, and returned *nulla bona*; and it is said that the evidence does not establish Purinton's insolvency. The only evidence bearing on this issue was that of the judgment defendant. He testified that on June 10, 1893, he owned the real estate in controversy, one of the two lots occupied by him as a homestead, and one thousand and six hundred dollars or one thousand and seven hundred dollars worth of old stock and several hundred dollars in book accounts. The stock and book accounts went into the hands of a receiver appointed to adjust the accounts of the partnership which had existed between Foster and Purinton. All such property was exhausted in satisfying the debts of the firm. He was then asked: "Q. You own your property sought to be foreclosed in this suit? A. Yes sir. Q. You own certain property that went into the hands of the receiver? A. Yes, sir. Q. Do you own any other property? A. No, sir." From this, as the real estate in controversy did not exceed in value the amount due on the mortgage, it appears Purinton had no property subject to execution, and was insolvent. The defense interposed was set up in an amended answer, filed on the day of the trial.

2 We cannot agree with appellee that insolvency must be shown at or about the time the mortgage was executed. Evidence of the pecuniary condition of Purinton, the extent of his property, the part transferred and that retained, was admissible as bearing on the allegation of fraud. But the finding of insolvency at that time was not essential to the maintenance of the action. *Rounds v. Green*, 29 Minn. 139 (12 N. W. Rep. 454); *Hager v. Shindler*, 29 Cal. 48; *Kain v. Larkin* 141 N. Y. 144 (36 N. E. Rep. 9); Wait, *Fraudulent Conveyance*, section 239; 5 Enc. Pl. & Prac. 566. See *contra*, *Romine v. Romine*, 59 Ind. 346.

III. Upon a careful examination of the evidence, we discover nothing indicating an intention to defraud creditors. Neither the extent of Purinton's property when the mortgage was executed nor the amount of his

indebtedness was shown. Apparently he had
3 more than enough to satisfy all his debts. The

consideration of the mortgage was made up of the following items: Note of Purinton, three hundred and thirty-nine dollars and fifty-four cents; book account, eighty-three dollars and thirty-four cents; note of Mrs. Purinton, one hundred and ninety-four dollars and eight cents; cost of a lot bought for Mrs. Purinton about nine years previous, with eight per cent. interest, one hundred and seventy-six dollars; seven hundred and seven dollars and four cents in cash. No question is made but that the first three were justly owing the plaintiff. The lot cost him one hundred dollars, and was conveyed to Mrs. Purinton. He did not give it to her, but made an entry of the transaction in his private account, with a view of having the amount paid considered as an advancement in the settlement of his
estate. Under these circumstances, an agree-

4 ment to repay was not without consideration.

Rather than to have it deemed an advancement, his daughter might prefer payment; and, if so, the contract therefor was valid. It seems that Mrs. Purinton had acted as bookkeeper of the firm, by virtue of employment by her husband, and there was due her five hundred and forty dollars. That she performed the services is not questioned. But it is said that she was paid under an arrangement by which her housekeeper received compensation from the firm in lieu of her services. The testimony of two witnesses that she so stated is denied by her. Foster says he did not employ her, but knew she was at work. He was a silent partner, and it was not a part of his duties to engage

help. Both the Purintons testify to the employment on the wages claimed. We think the evidence shows Mrs. Purinton entitled to compensation, and the amount paid her was not unreasonable. She refused to join in the execution of the mortgage unless paid the amount due her. She left the five hundred and forty dollars received with the bank, taking a certificate of deposit, with an oral promise for the payment of five per cent. interest. Afterwards she borrowed one hundred dollars from her father, but this alone does not indicate bad faith. She explains it by saying that she did not wish to lose the accrued interest. The one hundred and sixty-seven dollars and four cents was turned over to Mrs. Purinton for her husband. An inference of fraud cannot be based on the mere fact that the debtor borrows money to pay an amount owing his wife, and secures the payment of valid indebtedness due from her. If Purinton was having trouble with Foster, as is claimed, the nature of that trouble is not shown. Indeed, the record is barren of facts or badges from which fraud may be inferred.

IV. It appears that on April 23d, after both parties had concluded the introduction of the evidence, the court suggested that insolvency had not been proven. The defendant thereupon insisted this
5 was unnecessary, and then, after argument, that the evidence was sufficient on that point, time was taken to have a portion of it transcribed. Thereupon the court adjourned till April 28th, when the defendant moved for permission to introduce evidence of Purinton's insolvency because of oversight. This motion was overruled. The record does not bear out the claim that the omission occurred through oversight. The defendant's attention was called to the condition of the record while the witnesses were in attendance. These lived at considerable distance from the

county seat, and recalling them would involve extending the term, as it was the last day of the session. Besides, as we have seen, Purinton's insolvency at the time the defense was pleaded had been shown, and the fact of its existence when the mortgage was executed was not essential to recovery. We think the court did not abuse its discretion in overruling the motion. The decree is affirmed.—AFFIRMED.

WATERMAN, J., took no part.

E. G. HOPPES v. ANDREW BAIE, Appellant.

Mechanic's Lien. A well, designed, sunk, and completed for permanent use is an improvement within Acts Sixteenth General Assembly, chapter 100, section 3, giving a mechanic's lien for material or
2 labor furnished for any building, erection or other improvement upon land, upon the building, erection or improvement, and upon the land.

ERROR IN STATEMENT. The filing of a statement for a mechanic's lien is not necessary to create a lien under the statute, as between the
1 parties, and therefore the filing of an erroneous statement will not necessarily defeat the right of a contractor to a lien.

Appeal from Marshall District Court.—HON. B. P. BIRDSALL, Judge.

SATURDAY, MAY 21, 1898.

ACTION in equity to recover an amount alleged to be due for drilling and casing a well, and for the foreclosure of a mechanic's lien therefor. There was a hearing on the merits, and a decree for the plaintiff. The defendant appeals.—*Affirmed.*

J. M. Bishop and Binford & Snelling for appellant.

James Allison for appellee.

ROBINSON, J.—On the twenty-seventh day of June, 1895, the parties to this action entered into an agreement the terms of which were expressed in a writing signed by the plaintiff, and a copy of which is as follows: "This agreement, made and entered into this twenty-seventh day of June, 1895, by and between E. G. Hoppes, of State Center, Iowa, and Andrew Baie, witnesseth: That said E. G. Hoppes has this day agreed to drill a well for said Baie on the farm occupied by Albert Baie, southeast of State Center, and furnish and place therein five (5) inch inserted joint iron casing, as far as possible, and privilege of reducing when necessary, and agrees to sink said well until a good and sufficient flow of water is obtained, or he says stop, he being satisfied with well; and, if said well fails, said E. G. Hoppes agrees to return and sink same not to exceed one thousand (1,000) feet, and test same before leaving; and said Andrew Baie agrees to pay said E. G. Hoppes therefor the sum of one dollar per foot in cash upon turning over said well to said Baie, or his note bearing interest at 8 per cent. per annum, and said Baie further agrees to furnish board for men and teams while at work on said well. Witness our hands, this twenty-seventh day of June, 1895. E. G. Hoppes." Acting under that agreement the plaintiff drilled and cased, on the farm of the defendant designated, a well to the depth of two hundred and forty-four feet, and in December, 1895, filed in the office of the clerk of the district court of Marshall county, Iowa, a verified statement for a mechanic's lien, in which he claimed, on account of the well, one dollar per foot for the first one hundred feet, one dollar and twenty-five cents per foot for the second one hundred feet, and one dollar and fifty cents per foot for the remainder, eighteen dollars for the board of two men for three weeks, and ten dollars for putting a pump in the well on four different occasions, or for the

aggregate amount of three hundred and nineteen dollars. The petition as originally drawn conformed to the statement for a mechanic's lien as filed, and not to the writing which was the basis of the agreement; but, the defendant having set out the agreement in his answer, the plaintiff filed an amendment to his petition, and a reply, in which he stated that, although he had signed and delivered the writing, he had understood that, although the defendant had retained the writing, he had refused to sign it or treat it as binding upon him until the commencement of this action; but the plaintiff admits in the pleadings referred to that the writing contains the agreement made by the parties, and asks judgment for drilling and casing the well according to the terms of that agreement, and for board which the defendant was required by the agreement to furnish, but which he did not furnish. The defendant denies that the well was completed as required by the agreement, and denies that the plaintiff is entitled to recover anything on account of it. The defendant, by way of counterclaim, asks to recover two hundred and five dollars and fifty-four cents for the cost of a test of the well made by the defendant, and for board furnished employes of the plaintiff, and for keeping his horses while the well was being drilled. The decree of the district court awarded to the plaintiff two hundred and forty-five dollars and provided for the sale of the premises in which the well had been drilled for the amount found due, with interest and costs.

1. The defendant objects to a recovery by the plaintiff, because of the variance between the written statement for a mechanic's lien and the original petition founded thereon and the petition as amended. We do not find that the variance is material. The amendment to the petition was authorized, and the case is to be tried upon the pleadings as amended; that is, upon the theory that the real agreement which the parties entered into is expressed by the

writing which was signed by the plaintiff. The fact that the statement for a mechanic's lien filed was drawn on the theory that the plaintiff was entitled to recover the amounts therein set out, instead of those provided for by the agreement, in view of the facts disclosed by the record, is not material. As between the parties to the contract, the filing of a statement for a mechanic's lien is not necessary to create a lien. *Peatman v. Power Co.*, 105 Iowa, 1, and cases therein cited; *Lee v. Hoyt*, 101 Iowa, 101; *Chicago Lumber Co. v. Des Moines Driving Park*, 97 Iowa 25. Therefore in such a case the filing of an erroneous statement will not necessarily defeat the right of the contractor to a lien, and we do not find that the statement filed in this case should have that effect.

The appellant argues very briefly that the drilling and casing of a well is not such an improvement as entitles the contractor who does the work, and furnishes the material therefor, to a mechanic's lien. The appellee has not given this point any attention in argument. Section 3 of chapter 100 of the Acts of the Sixteenth General Assembly, under which this action arose, provided that "every mechanic or other person who shall do any labor upon, or furnish any materials, machinery or fixtures for any building, erection or other improvement, upon land * * * by virtue of any contract with the owner, * * * upon complying with the provisions of this chapter, shall have for his labor done, or materials, machinery or fixtures furnished, a lien upon such building, erection or improvement, and upon the land belonging to such owner on which the same is situated, to secure the payment of such labor done, or materials, machinery or fixtures furnished." It was held in *Brown v. Wyman*, 56 Iowa, 452, of section 2130 of the Code of 1873, which contained the provision we have quoted, that it did not authorize a lien for breaking prairie land; but a well designed to furnish a lasting

supply of water is of a different character, and may add as much to the permanent value of the land on which it is made as would any building which could be placed upon it. It is true that a well drilled into land is not an improvement upon land in precisely the same sense that a building is, but that might be said of the excavations for foundation walls and cellars. Nevertheless, the well, like the excavations for other purposes, is
2 in a sense supported by the land in which it is sunk; and the right to a lien for the excavations necessary for buildings will hardly be questioned by any one. We are of the opinion that a well designed, sunk and completed for permanent use is an improvement, within the intent and spirit of the statute, for which a mechanic's lien may be established. We are aware that the supreme court of Nebraska held in *The Omaha Consol Vinegar Co. v. Burns*, 49 Neb. 229 (68 N. W. Rep. 492) that a mechanic's lien cannot be established under a statute of that state which allows such a lien for labor performed or material furnished for the erection of "any house, mill, manufactory, or building or appurtenance." It will be observed, however, that the word "appurtenance" is used in that statute in a less comprehensive sense than is the word "improvement" in the statute under consideration. A well, although an improvement upon land, may not be appurtenant to any "house, mill, manufactory, or building."

II. The remaining questions discussed in the arguments submitted to us depend upon the evidence, which is voluminous and conflicting, and need not be set out. We are satisfied that a preponderance of the evidence shows that the plaintiff performed substantially all the requirements of the agreement on his part; that the well furnished a good and sufficient flow of water, as shown by repeated tests; and that the defendant was

at first, and should have continued to be, satisfied with it. The casing in the lower part of the well was less than five inches in diameter, but the reduction was necessary and authorized by the agreement. The counterclaim is without merit. The decree of the district court is fully sustained by the evidence, and is **AFFIRMED.**

106 653
106 816

P. F. GUTHRIE V. THE CITY OF DUBUQUE, Appellant.

Directing Verdict. A motion for the direction of a verdict by the party having the burden of proof should be denied unless considering all the evidence it clearly appears that it would be the duty of the court to set aside a verdict rendered for the other party.

RULE APPLIED. In an action against a city to recover for grading done under a written contract, in which the city reserved the right to increase or diminish the amount of grading, where there is a dispute as to the actual amount of grading done, owing to the inaccuracy of a bench mark, the question should be submitted to the jury.

Appeal from Dubuque District Court.—HON. J. L. HUSTED, Judge.

SATURDAY, MAY 21, 1898.

ACTION to recover three hundred and eighty-three dollars, with interest, balance alleged to be due under a written contract for grading, curbing, and guttering one of defendant's streets, the amount claimed being for a balance for grading. The defendant answered denying that anything was due for grading, and alleging that the grading done had been paid for. The issues will more fully appear in the opinion. At the close of the testimony the court, on motion, directed a verdict for the plaintiff for four hundred and forty-two dollars and twenty-six cents, and rendered judgment thereon. Defendant appeals.—*Reversed.*

J. E. Knight and N. W. Utt for appellant.

Lyon & Lenehan for appellee.

GIVEN, J.—I. The written contract provides that the city shall pay for "grading, in full, 10,200 cubic yards, at 19c., \$1,938"; and this is the number of cubic yards which plaintiff claims to have graded, and for which he asks one thousand, nine hundred and thirty-eight dollars, less one thousand, five hundred and fifty-five dollars, admitted to have been paid. The specifications, which are a part of the contract, give "estimated amount of grading cut, 10,200 cubic yards." Said specifications also contain the following: "The city reserves the right to change the grade of said street, thereby increasing or diminishing the amount of grading as estimated, and if from any change of grade, or any other cause, the amount of grading is materially changed, then the amount due and to be paid under this contract shall be increased or diminished in the same proportion." Appellant's contention is that the amount of grading done was not ten thousand, two hundred cubic yards, but was eight thousand, one hundred and sixty-three cubic yards. The estimate of the grading, as stated in the contract and specifications, was taken from measurements obtained from using a city bench mark at Schuler's store, and appellant claims that this bench mark was erroneous to the extent of about one foot, and therefore showed one foot of grading more than was actually done; that when the grading was made measurements were taken from a correct bench mark, called "Rigi Station," which showed the correct number of cubic yards graded, namely eight thousand, one hundred and sixty-three. Appellee contends that the estimate stated in the contract and specifications is correct, and therefore the controlling issue in the

case is as to the actual number of cubic yards that were graded.

We will not set out the evidence on this issue, but simply mention its general tendency. The plaintiff testified that he graded ten thousand, two hundred cubic yards, basing this statement upon calculations made from the profile of the work in the city engineer's office and on the figures on the grade stakes set by the assistant city engineer. His testimony tends quite strongly to sustain his claim as to the number of yards graded. Mr. E. S. Hyde, assistant city engineer, who had charge of this work, was called by the defendant and examined at length. His testimony shows that the estimates stated in the contract and specifications were arrived at by measurements from the bench mark at Schuler's store, and tends to show that the bench mark was incorrect to the extent of nearly one foot, and that estimates made therefrom showed more grading than was actually done to the extent claimed by the appellant. His testimony also tends to show that Rigi Station corresponded with other bench marks in its vicinity; that it was correct; and that estimates made therefrom showed that only eight thousand, one hundred and sixty-three cubic yards were actually graded. Mr. Ed. C. Blake, city engineer, was called by defendant, but, as the work was in the charge of Mr. Hyde, he knew but little concerning it except as told by Mr. Hyde, and therefore gave no testimony requiring mention here. Mr. Mathew Tschirgi, called by the plaintiff, testified as to the manner of establishing bench marks, and the elevation of different bench marks in the city, and on redirect examination states as follows: "At the time we improved Delhi street there was a slight variation discovered between the bench mark at Schuler's store and the one at Rigi Station. If my recollection is correct, it is something over two or three-tenths."

We may say here this evidence was objected to as not fixing the time, but the time would only go to the weight to be given to it, and the objection was properly overruled. Mr. Eugene Anderson, a civil engineer, was also called by plaintiff. He stated that in improving a street with reference to the bench mark at Schuler's store and the one at Rigi Station there would be a difference in the amount of excavation if the ground was cross-sectioned from one bench mark and the improvement was made on the other, but if made from one bench mark there would be no difference. Plaintiff also introduced in evidence an estimate made, as he states, when "the grading had not been quite finished at that time. The sidewalks had to be graded. The biggest part was done, except a little trimming on the sidewalks." The estimate is as follows:

The City of Dubuque, to Guthrie & Chesterman:

To grading West Fourteenth street from Delhi

to Atlantic avenue.....\$1,938 00

Received on same..... 500 00

Balance due\$1,438 00

Allow \$500.00.

O. K., Blake, City Engineer.

John Glab.

II. We have seen that in the contract the amount of grading to be done was estimated to be ten thousand, two hundred cubic yards. We have also seen that the contract provides that, "if from any change of grade or any other cause the amount of grading is materially changed, then the amount due and to be paid under this contract shall be increased or diminished in the same proportion." If, because of an error in the bench at Schuler's store, the estimate in the contract was not correct, we have a cause that materially changed the amount of grading from that stated in the contract,

and in that case appellant is entitled to have the estimate diminished accordingly. There is no dispute in the evidence but that the bench mark at Schuler's store was to some extent incorrect, nor is there any dispute that the estimate stated in the contract was arrived at by measurements from that bench. We are of the opinion that under the contract and the evidence the court, under the rule announced in *Meyer v. Houck*, 85 Iowa, 319, should have submitted the issue as to the number of cubic yards actually graded to the jury. Much is said in argument as to the weight that should be given to the evidence, and especially to that of Mr. Hyde, but that is a question peculiarly for the jury. While we express no opinion as to which party was entitled to a verdict under the evidence, we think that an impartial finding of a jury in favor of either could not properly have been set aside. Some question is made by appellee as to the sufficiency of the assignment of errors, but we think they are sufficient. For the error pointed out the judgment of the district court is REVERSED.

NANCY L. WEAVER, Appellant, v. J. S. STACEY.

Parol Variance: RETURN ON EXECUTION. In an action for the wrongful sale of tax certificates on execution, the officer's return was to the effect that he had "sold certificates * * * to the amount of \$116 30." *Held*, that parol or documentary evidence of the

- 1 number sold, for which recovery was sought, what they sold for, and their actual value, did not contradict the return, but proved facts with regard to which the return was silent, and was therefore competent.

Voluntary Payments: PENDENTE LITE. Money voluntarily paid to

- 2 redeem property sold under a decree which is thereafter reversed cannot be recovered.

RULE APPLIED. One whose property was sold under execution against another and who redeems from the sale, cannot recover the surplus arising from the sale, which was applied to a second execution, from the holder of such execution, although the sale was

made pending an appeal from a decree subsequently reversed which adjudged the property subject to the executions.

Assignment: CONSTRUCTION. An assignment of a claim arising from an erroneous decree subjecting property to judgment liens was "for property taken and money paid as costs, and * * * to redeem 3 from sale made under * * * a decree entered" in an equity suit named. *Held*, that this language sufficiently expressed an intent to assign claims arising out of execution sales on judgments made liens by the decree, on the property sold

Appeal from Jones District Court.—HON. WILLIAM P. WOLF, Judge.

SATURDAY, MAY 21, 1898.

ACTION to recover the value of certain property wrongfully sold on execution. The cause was tried to a jury, that returned a verdict for plaintiff for two hundred and sixty-one dollars and forty-seven cents, and, from a judgment thereon, both parties appealed. *Affirmed* on defendant's appeal and *reversed* on plaintiff's appeal.

Hubbard, Dawley & Wheeler for plaintiff.

F. O. Ellison and J. S. Stacy for defendant.

GRANGER, J.—I. We will first consider the case on plaintiff's appeal. In 1889 an equity cause was tried in which the defendant J. S. Stacy and others were plaintiffs, and Nancy L. Weaver, plaintiff, and others, were defendants, in which suit the district court adjudged that certain property of plaintiff and F. D. Weaver was subject to the payment of debts of one D. Weaver. On appeal to this court, the judgment was reversed, and said property was held not subject to such payments. (87 Iowa, 72.) Pending the appeal in this court, Stacy took execution, and sold certain of the property held by the district court, as subject to such debts, and

received the proceeds thereof. Such sales being wrongful, this action is brought to recover the value of the property so sold. The proceeding in which the property was sold was Jamison v. Weaver, and is spoken of as the "Equity Suit." Of the property sold for which recovery is sought in this action, were certain tax certificates. There were seventy-nine of such certificates levied upon, and all of them had been previously levied upon by virtue of other executions in favor of other parties to the equity suit. The plaintiff in this suit put in
1 evidence the sheriff's return on the execution on which the sale was made for which recovery is now sought. This return shows a levy upon the seventy-nine tax certificates, and then as follows: "I sold tax certificates to apply on this execution to the amount of \$116.30. I sold each tax certificate separately. Then I sold real estate enough to satisfy the balance of this execution." As to such execution, the court said to the jury: "As to the item No. 2 for the value of 79 tax certificates levied on in the case of Stacy, assignee, against D. Weaver, you are instructed that as the certificates sold have not been identified, and therefore the value could not be shown, you can only find on that item the amount for which such certificates were sold and applied on said execution, to-wit, the sum of \$116 30-100, together with interest thereon from February 13, 1890." It appears that the actual value of the seventy-nine certificates was one thousand, two hundred and sixty-five dollars. Plaintiff offered to prove by witnesses how many certificates were sold for which recovery, is now sought, what they sold for on execution, and their actual value, which the court refused, on the ground that such proof would contradict the officer's return. It will be seen from the instruction quoted that no more than the amount for which the certificates sold could be recovered, because they could

not be identified, and therefore the value could not be shown. The objection to the offered evidence is that the return was the best evidence. The argument is upon the theory that the testimony would contradict the return. Looking to the return, it will be seen that it is silent as to the number of certificates sold, or their value. It simply shows that enough were sold to realize one hundred and sixteen dollars and thirty cents at the prices offered. There is no attempt whatever to dispute that. No result of the offered evidence would change the fact shown by the return. It would simply show what the return does not—the number of certificates sold on the execution and their actual value. In Freeman on Executions (volume 2, section 364) after stating the general rule that neither party can dispute or impeach the officer's return, and that the officer will not be permitted, when called as a witness, to give testimony contradicting or impeaching his own return, it is said: "The return may be ambiguous, or may not be so specific as to show all the acts done by the officer. In such a case the evidence may properly be received in explanation of the return, or to establish the existence of facts of which the officer omitted to make any sufficient statement." If it is to be said that the matters which plaintiff sought to prove are of the kind required to be stated in a return—which we do not decide—still, under the rule given, parol proof of them was proper, because they had been omitted from the return. We have not seen any authority against such a rule, but understand it to have general support. Some authorities are cited to show that a return cannot be attacked in a collateral proceeding. The proposed testimony in this case is not an attack on the return. The verity of the return is conceded. The case of *West v. St. John*, 63 Iowa, 287, is where there was an attempt to prove the fact of a return by a copy or by parol,

without showing the return to have been lost or destroyed. The case presents an entirely different question. The case of *Smith v. De Kock*, 81 Iowa, 535, is nearer in point and permits the use of evidence to show what did not appear in the return. The offered evidence should have been admitted.

II. Some executions, which had been levied on the certificates before the one in the Stacy Case, were put in evidence by defendant, with the returns thereon, evidently to show that some of the tax certificates had been sold on those executions; and by the returns it so appeared, but not how many, and plaintiff objected to the evidence for the reasons stated by defendant to the evidence offered by plaintiff for a similar purpose, the only differences being that in one case the evidence was by parol, and in the other case documentary. We think plaintiff's objections are of the same legal force as those of defendant and no more. In this case, as in the other, it was an attempt to make appear, by other evidence what did not appear by the return, but not to in any way contradict or change its legal effect. If such evidence could not be used—we mean evidence to show what did not appear by the return—then the conclusion must be that defendant would be liable for the value of the seventy-nine certificates, because all were levied upon by direction of defendant, and none are returned or accounted for as unsold, and hence the presumption would be that all were sold. To avoid such a conclusion, defendant offered evidence against it, which was properly admitted. Defendant's liability is for the actual value of the certificates sold, and evidence for their identification and to show their value is proper.

III. Certain real estate had been sold on what is known as the "Sheehan & McCarn execution," and there remained a balance of one hundred and fifty-one

dollars and sixty cents, which the sheriff applied on the Stacy execution, and it is an item for which recovery is sought in this case. The court, by its instructions, took such item from the consideration of the jury, because it came from an interest in real estate, as we understand, not belonging to plaintiff. The basis

2 of plaintiff's claim is that she had paid money to redeem the land, and hence had a right to the surplus. To that part of the petition there was a demurrer, which the court sustained, and on appeal to this court the ruling was affirmed. (93 Iowa, 683.) The holding was that there could be no recovery for the money paid for redemption. To permit a recovery of this surplus would be to permit a recovery for the redemption money. We think the ruling on the demurrer is conclusive of plaintiff's right in this respect.

IV. We now notice defendant's appeal. As to the property for the sale of which there can be a recovery, plaintiff's right of action depends on an assignment to her thereof by F. D. Weaver, which is in writing.

3 The equity action above referred to was brought by four judgment creditors of D. Weaver, to subject property in the hands of plaintiff, F. D. Weaver, to the payment of such judgments; and the district court, as we have said, gave judgment for the plaintiff, and then executions were taken on the previous judgments, and also for costs in the equity case. F. D. Weaver, in his assignment to plaintiff of his claims, specified them as "for property taken and for money paid as costs and money paid to redeem from sales made under and by virtue of a decree entered in the district court of Jones county," and then follows what would identify the equity case. At the close of the evidence, defendant moved for judgment in his favor, on the ground that the assignment, because of its reference to the equity case, did not assign claims arising out of

sales made on executions issued on other judgments. The question turns on the intent to be gathered from the assignment itself. In a sense, the sales were made "under and by virtue of a decree" entered in the equity case. That decree subjected the property to the payment of the judgments, and then executions were taken on the judgments. The intent of the parties should obtain, as it is clearly manifest. On defendant's appeal the judgment is **AFFIRMED**. On plaintiff's appeal it is **REVERSED**.

INDEPENDENT SCHOOL DISTRICT OF OAKLAND, IOWA, v.
GEORGE W. HEWITT, Appellant.

Eminent Domain: SCHOOL LANDS: Presumptions. Under Code, 1873, section 1827, providing that, in case the owner refuse or neglect to convey land designated for school purposes, the same may be acquired by condemnation in the manner therein provided, a condemnation proceeding in all respects conforming to the strict requirements of such statute presumes that no more than the area of land permitted to be acquired was taken, that the owner withheld his conveyance thereof, that such taking was necessary, and that the requisite tax was voted for its purchase, and all conditions precedent to the exercise of such power were performed.

SAME. Under Code, 1873, section 1825, providing for the taking by condemnation of land "for the location or construction of a school house or for the convenience of the school," and section 1828 that such land shall be for school purposes only, and if not so used shall revert, an appropriation of land used for a school play ground is for the convenient use of the school, and, although not used for an original building site, is not within the latter statute, and does not revert.

TAX SALE. Under chapter 101, Acts, Seventeenth General Assembly, providing that all lands exempted from taxation, including lands of any school district shall not be affected by any sale for taxes, nor shall such sale or any conveyance thereof affect or prejudice the public right therein or confer any adverse title or interest on the purchaser, a school site cannot be sold for taxes, or title by tax sale acquired thereto, though the lien of the taxes attach before the acquisition of the property for school purposes.*

Secondary Evidence: DEEDS: Foundation. Code, 1873, section 3666, 2 providing that certified copies of the records of deeds are admissi-

* In this case the school district paid the tax sale price, penalties and interest, by order of the district court.—**REPORTER**.

ble when the original does not belong to the party desiring to use the same or is out of his control, a school district may prove title to land acquired by condemnation by such certified copies of deeds of persons through whom title is derived, when it shows that it did not possess the originals, and did not know where they were, it being in such case not presumed that the owner should have possession of such muniments of title; and this, though evidence is elicited on cross-examination tending to show that by diligent search the party might have known where the originals were, and perhaps, by *sub bene ducas tecum*, could have produced them.

Opening Up Case: DISCRETION. Where, on conclusion of the evidence, parties consented that the trial should be resumed and argument and submission made and decree entered in vacation as of the last day of the term, and plaintiff, discovering, by argument of defendant, served on him, his omission to lay a foundation for the admission of the certified copies which proved his title, asked leave to introduce further evidence to correct the oversight, the record not showing at the time, a final submission of the case, it was not abuse of discretion to give such leave.

Distinguishing *Dunn v. Wolf*, 81 Iowa, 688.

Appeal from Pottawattamie District Court.—HON. A. B. THORNELL, Judge.

MONDAY, MAY 23, 1898.

ACTION to quiet title. Decree for plaintiff and defendant appeals.—*Affirmed.*

George W. Hewitt, per se.

Benjamin & Preston for appellee.

LADD, J. The plaintiff introduced certified copies of deeds, tracing the title from the government to John T. Baldwin, and of a plat duly filed by him including lots 6, 7, and 13, in block 8, in Oakland, Pottawattamie county, Iowa, and claimed title thereto by virtue of condemnation proceedings concluded by depositing the damages assessed by the appraisers with the county treasurer, February 27, 1890. The lots were assessed and taxes levied thereon in 1889, and sold for taxes December 1, 1890. On the same day the certificate was

assigned to the defendant, to whom a tax deed was executed December 21, 1893. He claims title under this deed.

I. The introduction of evidence was concluded October 2, 1896, and this entry made: "Trial of the cause is resumed and concluded, and, by agreement of the parties, this cause is to be argued and decided in vacation, and a decree to be rendered in vacation and entered of record as of the last day of this term of court, each party to have exception to all rulings and judgment of the court." The plaintiff discovered on the twelfth day of October that no foundation had been laid for the introduction of the certified copies of the deeds and plat, and on the following day filed an application to the court asking that the submission of the case be set aside and it be allowed to introduce
1 further evidence. The attention of its attorneys had undoubtedly been called to the condition of the record by the defendant's argument served the day before. The hearing on this application occurred November 30th, and at that time the plaintiff withdrew that part of the motion asking the submission to be set aside, upon the suggestion of the defendant to the court that a final submission was conceded by the terms of the application. This record does not show that the case had been finally submitted. For this reason it is not within the rule of *Dunn v. Wolf*, 81 Iowa, 688. The evidence was necessary in order to secure a decision on the merits, and permitting its introduction only deprived the defendant of a technical advantage acquired by the evident oversight of his adversary. The application was addressed to the sound discretion of the court, and this was not abused. *Sickles v. Bank*, 81 Iowa, 408.

II. It is insisted that, when permitted to do so, the plaintiff failed to introduce evidence warranting the

use of certified copies. That these deeds were not likely to be in the possession of the officers of the district is apparent. The lots were not claimed through conveyance from the owner, but by condemnation proceedings. They formed a very considerable portion of the description in the deeds of the land platted. The secretary and president of the board of directors testified that the district had neither the possession nor control of the deeds or plat, and that they did not know where they were. On cross-examination evidence was elicited tending to show that by diligent search they might have learned where the originals were, and perhaps, by *subpœna duces tecum*, could have produced them. This was unnecessary. It was shown conclusively that the deeds and plat did not belong to plaintiff and were not within its control. No more was required. Code 1873, section 3660; *McNichol, v. Wilson*, 42 Iowa, 385.

III. The board of directors of the district notified the county superintendent to condemn these lots "for school purposes according to law," December 16, 1889. It is admitted the superintendent, during 1889 and 1890, performed all the duties with reference to the condemnation proceedings required of him, and caused notice thereof to be served upon John T. Baldwin, December 17, 1889, and that the appraisers performed all their duties, and fixed the value of the land in controversy at one hundred and five dollars. This amount was forwarded to the county treasurer, in pursuance of an order made by the plaintiff's board, February 22, 1890, and deposited with the treasurer five days later. At about this time John T. Baldwin died, and John Beresheim was appointed executor of his estate, and, as such, received the money deposited with the county treasurer, May 14, 1891. It will be observed that every requirement for the condemnation of land for school

purposes was followed strictly. Code, 1873, section 1827. The appellant, however, says the petition does not allege, nor the evidence establish, the necessity thereof, or that Baldwin neglected or refused to convey, or that less than one acre was taken, or that a tax was voted to purchase the grounds. If the petition is defective in the respects claimed, this cannot be taken advantage of for the first time in this court. *Shelly v. Smith*, 97

Iowa, 259, and authorities cited. The officers of
3 the district and the superintendent were bound to satisfy themselves that all the conditions precedent were such as to warrant these extraordinary proceedings before resorting to that method of obtaining the lots, and they are presumed to have done their duty. That they so did is confirmed by the fact that no appeal was taken, and the value fixed by the appraisers accepted by the executor. The statute does not require compliance with the conditions precedent to appear in the application to the county superintendent or to be made of record, and, where the proceedings are regular, this will be presumed, in the absence of any showing to the contrary. Code, section 4648.

IV. Lands may be condemned "for the location and construction of a school house and for the convenient use of the school." Code 1873, section 1825. Ample grounds are quite as essential for the exercise and recreation of the children as for the construction of a house. The school house had been erected on an adjoining lot, and these appear to have been taken for
4 use as a playground for the children. If so, they were for "the convenient use of the school," and the fact that they were not for an original site furnishes no objection to their appropriation. The lots were continually used for this purpose, and there was no abandonment, within the meaning of section 1828.

V. The defendant insists his tax deed is valid because the lots were assessed, and the taxes for which

they were sold levied, before the property had been condemned to the public use. With this proposition we cannot agree. Under section 797, the lots were not exempt from taxation. The assessment and levy were valid. But chapter 101, Acts Seventeenth General Assembly provides that "all lands exempted from taxation by the provisions of this title, including

5 lands * * * of any * * * school district," shall not be affected by any sale made for taxes, and "no assessment or taxation of such lands, nor the payment of any such taxes by any person, or the sale or conveyance for taxes of any such land, shall in any manner affect the right or title of the public therein, or prejudice the public thereto, nor shall any such payment or sale, confer upon the purchaser or person who pays such taxes any right or interest in such lands, adverse or prejudicial to the public right, title or ownership thereto." The meaning of this is clear and unequivocal. Prior to the enactment of this statute, land devoted to the public use might be sold for taxes levied before its acquirement for that purpose, and to obviate such a sale this law was enacted. It may be, as contended by the appellant, that some of the provisions are unnecessary, in the light of section 797. But it is later in point of time, and full effect must be given to all its provisions. We are asked why *Town of Mitchellville v. Board of Sup'rs*, 64 Iowa, 554, was not determined under this act instead of section 797. The construction of the latter only was involved. There the property was held not to be exempt because not devoted entirely to public use. It was held for pecuniary profit. While different classes of property are enumerated in section 2 of the chapter referred to, all are expressly included in the clause, "all lands exempted from taxation by the provisions of this title." This was the thought of the legislature in omitting

much of this act as surplusage in preparing the Code. See Code, section 1435. *First Congregational Church v. Linn County*, 70 Iowa, 396, is relied on. It is there held the property, prior to its use for religious purposes, was subject to taxation. The same is true of these lots. How these taxes may be collected cannot be determined in this action. It is sufficient that the statute prohibits collection by sale. Besides, the district court required the amount bid at the sale, with penalties and interest, and subsequent payment, with interest, to be paid by the district, and this has been done. The defendant acquired no interest whatever in the lots under his deed. The decree is affirmed.—AFFIRMED.

CITIZENS NATIONAL BANK OF DES MOINES, IOWA, v.
GEORGE E. CONVERSE, Appellant.

105	669
106	331
105	669
121	223

Wrongful Attachment: EVIDENCE. Evidence that the attaching creditor, before the writ was sued out, was shown a telegram addressed to his attorney by another creditor whom the attorney
4 represented stating that the debtor was sure to fail and directing him to attach at once unless the debtor should secure the claim is admissible on the question as to whether or not the attachment was wrongfully sued out raised, by the defendant's counter-claim for damages.

SAME. Mortgages executed by an attaching defendant on the same day but after the attachment was levied are admissible in favor of
8 the attaching creditor upon the issue raised by the defendant's counter-claim for damages for wrongfully suing out the attachment.

SAME. On an issue as to wrongful attachment, written bids for the property made after advertisement by the receiver appointed
2 therein are admissible in evidence, as tending to show whether the goods sold for a fair price, even if not of themselves sufficient to prove the value.

Pleading: AMENDMENT: Attachment. An attaching creditor may be permitted to amend his petition after the writ is sued out so as to show that legal cause for attachment existed at the time the writ was issued by alleging an additional ground of which he was not
1 informed until after the levy, under Code, section 3021, providing

that no attachment shall be quashed or dismissed, or the property attached released because of a defect in the proceedings if the same has been or can be amended so as to show that a legal cause for attachment existed at the time it was issued.

Exclusion of Evidence. It is proper to overrule an objection to evidence, if admissible for any purpose.

Additional Charge: CURING ERROR. Possible error in instructions, on account of their being misleading, may be cured by further instructions given to the jury, on their request, after retirement, which correct any wrong impressions to be obtained from the original ones.

Appeal from Polk District Court. —HON. W. F. CONRAD, Judge.

MONDAY, MAY 23, 1898.

ACTION at law upon five promissory notes. A writ of attachment was issued, and levied upon a stock of goods belonging to the defendant. Thereafter, a receiver was appointed, and the goods were sold by order of court. Defendant admitted the execution of the notes, and pleaded a counterclaim for the wrongful suing out of the attachment. Trial to a jury. Verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

C. C. & C. L. Nourse for appellant.

W. E. Odell for appellee.

DEEMER, C. J.—After the writ had been sued out, plaintiff filed an amendment to its petition, in which it alleged, as an additional ground for an attachment, “that the debt was incurred for property obtained under false pretenses.” It further alleged that this ground
1 existed at the time the original petition was filed,
 but that it was not informed of the fact until
after the levy of the writ. Defendant moved to strike

this amendment, but his motion was overruled. The court instructed the jury that, if this ground for attachment actually existed at the time the writ was sued out, then it was not wrongful, and further said that, if the jury found that this ground did not exist, then they need not consider whether plaintiff had reasonable ground to believe it to be true, for the reason that plaintiff did not know when it sued out the attachment whether it was true or not. Complaint is made of the ruling and of the instruction. Section 3021 of the Code of 1873 is as follows: "This chapter shall be liberally construed, and the plaintiff at any time when objection is made thereto, shall be permitted to amend any defect in the petition, affidavit, bond, writ or other proceeding; and no attachment shall be quashed, dismissed, or the property attached released, if the defect in any of the proceedings has been, or can be amended so as to show that a legal cause for the attachment existed at the time it was issued; and the court shall give the plaintiff a reasonable time to perfect such defective proceedings; the causes of attachment shall not be stated in the alternative." We think this section is broad enough to authorize the procedure in this case. It permits the amendment of the petition to show that legal cause for the attachment existed at the time the writ was issued. This is exactly what was done by the plaintiff. In the case of *Griffith v. Harvester Co.*, 92 Iowa, 638, we said: "One of the evident purposes of this section is to prevent the loss to the plaintiff, by reason of defects in the proceedings which he is able and willing to cure, of the benefits he would derive from the attachment, and to give him a reasonable opportunity to make the correction." The cases of *Wadsworth v. Cheeny*, 10 Iowa, 257, and *Bundy v. McKee*, 29 Iowa, 253, seem to fully justify the ruling on the motion. The instruction to which we

have referred was undoubtedly correct. *Vorse v. Phillips*, 37 Iowa, 428. But it is said that, taken in connection with other instructions relating to reasonable ground for belief of the matters stated as grounds for attachment, it was misleading and confusing. The other instructions stated rules applicable to such counterclaims, in the ordinary and usual manner, and made the question of plaintiff's belief in the truth of the ground for attachment set up in the amendment a material inquiry. After the jury had retired, they asked for further instructions; and the court gave the one to which we first called attention, premising it with the statement that this ground for attachment was set up, by way of amendment to the petition, after the attachment was issued, and then stated that, if they failed to find it was true, then they need not consider whether or not plaintiff had reasonable ground to believe it to be true. The error, if any, in the original instructions, was covered by the additional charge; and, when all are considered together, there is no reason for thinking that the jury was misled thereby.

II. Plaintiff was permitted to introduce in evidence the written bids made to the receiver for the goods levied upon under the attachment, and the report of the receiver with reference to the sale. This is said to be error, because such bids are not competent to prove value. These bids were in writing, and were filed in the receivership proceedings. We have held, in cases involving the value of personal property, that it is competent to show what the property sold for. See *Buford v. McGetchie*, 60 Iowa, 298; *Clements v. Railway Co.*, 74 Iowa, 442. And the supreme courts of Michigan and New York, which hold to the same doctrine, also say that such evidence is competent, although the property was sold at auction. *Smith v. Mitchell*, 12 Mich. 180; *Davis v. Zimmerman*, 40 Mich.

24; *Dyer v. Rosenthal*, 45 Mich. 588; *Campbell v. Woodworth*, 20 N. Y. 499, or at sheriff's sale (*Gill v. McNamee*, 42 N. Y. 44). If this rule be correct,—and we think it is,—then it is certainly competent to show the number of bidders, and the offers made at the time the goods were exposed for sale. Such evidence, if not substantial proof of value, would throw considerable light upon the question as to whether or not the goods sold for a fair price. Mention should be made, before leaving this branch of the case, of the fact that the sale was made within a few weeks after the levy of the attachment. The evidence was competent, and relevant to the issues presented; and, although it may be conceded that it was not of itself sufficient to prove value, and of but little value, yet, if admissible for any purpose, the court properly overruled the objection. See, also, *Joy v. Insurance Co.*, 83 Iowa, 12, and *Thompson v. Anderson*, 94 Iowa, 554.

III. Certain mortgages executed by defendant on the same day, but after the attachment was levied, were introduced in evidence over defendant's
3 objection, and the ruling is assigned as error. We have heretofore held that such evidence is admissible. *Mayne v. Bank*, 80 Iowa, 710; *Deere v. Bagley*, 80 Iowa, 197.

IV. Shortly before the attachment was sued out, one of defendant's creditors telegraphed the attorneys for the bank with reference to a claim of one thousand dollars it held against him, saying, among other
4 things: "He is certain to fail. Unless he will secure at once attach." This telegram was shown some of the officers of the bank before it sued out the writ, and was admitted in evidence over appellant's objection. That it was properly admitted, see *Deere v. Bagley* and *Mayne v. Bank*, *supra*; *Bowman v. Manufacturing Co.*, 96 Iowa, 188.

V. Some other questions, relating to the sufficiency of the evidence, and to alleged errors of the court in submitting certain issues to the jury, are argued by counsel. They are not of sufficient moment to justify separate consideration, and we dismiss them by saying we discover no error. The verdict has support in the evidence, and the judgment is **AFFIRMED**.

105 674
109 57

THE CEDAR RAPIDS PUMP COMPANY v. G. A. MILLER & SONS, Defendants, THE BENTON COUNTY SAVINGS BANK OF NORWAY, IOWA, Garnishee, Appellant.

Levy: BOOKS AND BOOK ACCOUNTS. A levy on books of account under an attachment is not a levy on the debts charged therein as Code, 1878, section 2967, provides that debts due a defendant shall be attached by garnishment.

Appeal from Cedar Rapids Superior Court.—HON. T. M. GIBERSON, Judge.

MONDAY, MAY 23, 1898.

PLAINTIFF brought this action to recover of the defendants G. A. Miller & Sons the sum of six hundred dollars, and caused an attachment to issue therein, under which the Benton County Savings Bank of Norway was garnished, as a supposed debtor to the defendants G. A. Miller & Sons. The case was tried to the court, and judgment rendered against the garnishee, on its answer, January 29, 1897, for two hundred and sixty-seven dollars and costs, from which judgment said garnishee appeals.—*Affirmed*.

Tom H. Milner for appellant.

W. L. Crissman and *C. D. Harrison* for appellee.

GIVEN, J.—I. The following facts appear in the answer of the garnishee, and a stipulation made by the

parties: Prior to the issuing of the attachment in this case, intervener had commenced an action in the district court of Benton county against G. A. Miller & Sons to recover fourteen thousand dollars, and caused an attachment to issue therein, and to be placed in the hands of Metcalf, sheriff of Benton county, for service. Upon the service of said notice of garnishment in this case, said sheriff levied the attachment in his hands upon the book accounts of Miller & Sons, and the books containing the same into his possession. After the sheriff turned over said books to appellant for the purpose of collecting the accounts and the contents of the books. Before the service of garnishment, appellant had collected on said accounts, and in his possession, two hundred and sixty-seven dollars and eleven cents, for which it thereafter gave the sheriff a certificate of deposit. None of the persons in said collections had been made were garnished. The only thing done by the sheriff in making the collection was to take possession of the books containing the accounts.

II. If the two hundred and sixty-seven dollars and eleven cents were in the custody of the law, by reason of the levy of appellant's attachment, then the superior court had no jurisdiction over it. Appellant's contention is that, by levying upon and taking possession of the books, the sheriff acquired legal custody of the accounts therein that were collected, and the right to collect the same, and that appellant's possession was as bailee for the sheriff. Appellee's contention is that the levy conferred no right or interest in the accounts, but simply in the material composing the books, and that, therefore, neither the accounts nor the money collected thereon were in the custody of the law. In other words, we have the question whether this levy on the account books was a levy on the debts charged therein. Section 2967

of the Code of 1873 is as follows: "Sec. 2967. What may be Attached and How Done. Stock or interest owned by the defendant in any company, and also debts due him, or property of his held by third persons, may be attached, and the mode of attachment must be as follows. (1) By giving the defendant in the action, if found within the county, and also the person accompanying or in possession of the property, if it be in the hands of a third person, notice of attachment. (2) If the property is capable of manual delivery, the sheriff must take it into his custody if it can be found. (3) Stock in a company is attached by notifying the president or other head of the company, or the secretary, cashier, or other managing agent thereof, of the fact that the stock has been so attached. (4) Debts due the defendant, or property of his held by third persons and which cannot be found, or the title to which is doubtful, are attached by garnishment thereof." The sheriff could take manual possession of the books, but not of the debts due to Miller & Sons. They could only be attached by garnishment. To make a legal levy, "the officer should do that which will amount to a change of possession, or something that will be equivalent to a claim of dominion, coupled with a power to exercise it." *Crawford v. Newell*, 23 Iowa, 453. There was no change in the possession of, or dominion over these debts,—nothing that gave the sheriff or appellant power to exercise dominion over them, or to prevent the debtors from paying to Miller & Sons. The statute is specific in providing how attachments may be made when the property is not capable of manual delivery, or cannot be found, and that "debts due the defendant * * * are attached by garnishment." See *Osborn v. Cloud*, 23 Iowa, 104; *Ochiltree v. Railroad Co.*, 49 Iowa, 150; 2 Freeman, Executions (2d ed.), section 262; Waples Attachment, 169; *Goodbar v. Lindsley*, 51 Ark. 380.

These authorities are all to the effect that a levy upon books of account is not a levy upon the debts charged therein, due by others to the defendant in attachment or execution. It follows from this conclusion that neither the accounts, nor the money collected thereon, were in the custody of the law, nor of the district court of Benton county, and that the superior court had jurisdiction thereof, and to render the judgment that it did. —AFFIRMED.

STATE OF IOWA V. J. N. PORTER, Appellant.

Evidence: MINUTES BEFORE GRAND JURY. The minutes of evidence
3 taken before a grand jury are not competent, as independent evidence, without the testimony of grand jurors, of what a witness testified to before them.

SUBORNATION OF PERJURY. In a trial for subornation of perjury, evidence of the testimony before a grand jury of a witness claimed
1 to have been suborned was material, as bearing upon the motive of defendant in procuring him to testify otherwise on the trial of the indictment of defendant which was based upon this witness' testimony.

Indictment: SUBORNATION OF PERJURY. An indictment for subornation of perjury which charged in the language of the statute
1 that the defendant suborned and procured a witness to testify falsely need not set out the means or methods employed by defendant.

Transcript: ABSENCE OF JUDGE DURING JURY ARGUMENT. A conviction is not unlawful because the judge stepped out of the court room during some of the argument of defendant's counsel where
2 he was not out of hearing of counsel, but heard all that was said and no prejudice appears.

Appeal from Guthrie District Court.—HON. W. A. SPURRIER, Judge.

MONDAY, MAY 23, 1898.

INDICTMENT for subornation of perjury. Verdict of guilty, and a judgment thereon, from which the defendant appealed.—*Affirmed.*

105 677
106 109
106 488
105 677
1107 709

105 677
114 481

105 677
115 189

105 677
116 289
1117 314

105 677
125 717
125 742

105 677
134 589

105 677
135 502

105 677
137 193

E. W. Weeks for appellant.

Milton Remley, attorney general, and *Jesse A. Miller* for the state.

GRANGER, J.—I. The defendant was previously indicted and tried for the crime of nuisance, in keeping and selling intoxicating liquors in violation of law. On the trial of that indictment one Frank Revell was a witness for the state, and testified that he did not on or about the tenth day of February, 1894, buy intoxicating liquor of J. N. Porter at his place of business in Guthrie Center, Iowa. For so testifying, an indictment for perjury was returned against Revell, to which he pleaded guilty. This indictment against defendant is for procuring such false testimony. Revell had testified before the grand jury, at the finding of the indictment, that he had purchased liquor of Porter, and on the trial of the indictment he gave contrary testimony.

1 The indictment in this case sets out the charging part of the indictment in the nuisance case; that Revell was a witness therein, duly sworn; and that "the said J. N. Porter did then and there willfully, corruptly, and feloniously suborn and procure him, the said Frank Revell, falsely to depose and swear, upon his oath aforesaid, in substance and to the effect following." Then follows what is charged as the false testimony. It is insisted that the simple statement that Porter did "suborn and procure" Revell to testify falsely is not enough, but that the means or method employed ought to be set out. The indictment includes the language of the statute, and this is sufficient in all cases where the statute so far individuates the offense that the offender has proper notice, from the statutory terms, of the particular crime charged. Wharton Criminal Pl. & Prac. 220. This is not a case where there is necessity for so stating the particular facts constituting the

inducement as to identify the transaction, nor is it one in which the method or means could have been lawful. If the defendant induced Revell to testify falsely, and did so knowingly, it is quite immaterial what means he used,—whether in themselves illegal or not. The crime does not inhere in the method or means, but in the result,—the procurement; and the defendant could be guilty of only one such offense as to a witness in a particular case. To charge seduction in the language of the statute is held sufficient. *State v. Curran*, 51 Iowa, 112; *State v. Conkright*, 58 Iowa, 338. And yet there is as good reason for requiring the facts to be set out. One guilty of subornation of perjury has been adjudged an accessory before the fact of perjury. *Com. v. Smith*, 11 Allen, 243. So it has been held that one charged with subornation of perjury may be presented in the same indictment with one accused of perjury, though each offense is made by statute a substantive felony. *Com. v. Devine*, 155 Mass. 224 (29 N. E. Rep. 515); *Reg. v. Goodhall*, Russ. & R, 461; *Reg. v. Goodhall*, 2 Russ. Crimes, 622, note o. Under our statute, distinctions between accessories before the fact and principals are abrogated, and all must be indicted as principals. Code 1873, section 4314. And, where a crime may be committed by only one person, another may be joined in the indictment, and convicted, for aiding therein. *State v. Comstock*, 46 Iowa, 266. In such cases the particular facts or method of aiding or abetting are not set out, the crime only being charged. Why should the particular facts constituting the procurement of one to commit perjury be particularly stated in an indictment for subornation thereof? It is made a distinct offense, under the statute; but this would not necessarily change the rule of pleading, more than to require the use of the language defining it in connection with the necessary allegation charging the commission of perjury. And this seems to have been the rule generally

adopted. See Wharton Criminal Law, section 1329; Wharton Precedents, Indictments, section 597; 2 McClain, Criminal Law, section 893 *et seq.*; *Com. v. Devine, supra*. The court rightly held the indictment not defective in the respect claimed.

II. It appears from the record that during the trial of this indictment the trial judge was out of the court room during part of the argument to the jury.

The showing is made by affidavits in support of
2 a motion for a new trial; and while it said that he was out of the hearing of counsel, who were arguing the case to the jury, there is no claim whatever of prejudice because of the absence. So far as the facts appear, the absence was during the argument by defendant's counsel. The statement of the court made in passing on the motion for a new trial is in the record; and it appears therefrom that, while the judge stepped out of the room during some parts of the argument, he was not out of hearing of counsel, and really heard all that was said. No error appears in this respect. *Baxter v. Ray*, 62 Iowa, 336; *Hall v. Wolff*, 61 Iowa, 559.

III. There is a complaint because the court permitted witnesses to testify to what Revell's evidence was before the grand jury in the nuisance case; a
ground of complaint being that the minutes of
3 the testimony taken before the grand jury were the only competent evidence of the facts, if competent to be shown by any evidence. That the minutes taken before the grand jury are not competent as independent evidence, see *State v. Hayden*, 45 Iowa, 11. See, also, *State v. Adams*, 78 Iowa, 292. It is also
claimed that such evidence was immaterial. The
4 court, in an instruction, limited the application of such evidence to the fact whether defendant knew of such testimony before the grand jury, and as bearing upon the motive of defendant in procuring

Revell to testify otherwise on the trial of the indictment. The testimony for that purpose was clearly proper. It went to the fact of his intention to procure false testimony.

IV. The court instructed the jury that it could not find that Frank Revell purchased liquor of defendant unless Revell's testimony was corroborated by other evidence as to that fact. It is urged that there is no such corroborative evidence, but we think otherwise. While it is not of a conclusive character, it is such that a conviction should stand under the rule as to a reasonable doubt. In truth, there is little room to doubt the fact. The judgment will be affirmed.—AFFIRMED.

ANN J. SNOUFFER V. THE CHICAGO & NORTH-WESTERN
RAILWAY COMPANY AND THE BURLINGTON, CEDAR
RAPIDS & NORTHERN RAILWAY COMPANY, Appel-
lants.

105	681
134	565
134	569
1134	573

Damages: EMINENT DOMAIN. The increased value of a lot at the time it was taken for depot purposes in condemnation proceedings, by reason of the anticipated construction of a depot in the locality, may be considered in determining the amount of the award of damages to the owner.

SAME: Instructions Construed. An instruction directing the jury, in assessing damages for the taking of land by a railroad, *not* to consider or *deduct* benefits derived on account of any enhanced value that has accrued to the owner by reason of any contemplated building of a depot thereon, cannot be construed as directing the jury to *add* such future accessions of value, where they are also instructed not to base their verdict on speculative values.

Cross-examination: VALUES. In proceedings to condemn land for railroad purposes, a witness who testifies to its value may be asked on cross-examination the value of other lots in the neighborhood and as to the price paid in one instance, to show his knowledge of values.

Appeal: OFFERED INSTRUCTIONS. Requested instructions are properly refused where the subject matter thereof is contained in the charge as given.

Appeal from Linn District Court.—HON. WILLIAM G. THOMPSON, Judge.

MONDAY, MAY 23, 1898.

PLAINTIFF is the owner of a lot in the city of Cedar Rapids which the two railway companies that are defendants herein have taken, through condemnation proceedings, for depot purposes. The defendants appeal from the award made by the sheriff's jury.—*Affirmed.*

S. K. Tracy, J. C. Leonard and Hubbard & Dawley for appellants.

Rickel & Crocker and Jamison & Smyth for appellee.

WATERMAN, J.—It is urged that the court erred in not sustaining defendants' motion to strike from the record the testimony of one Bealer with relation to the amount other lots in the vicinity had sold for.

1 The facts are that Bealer was a witness introduced by defendants. After giving his opinion as to the value of plaintiff's lot, he was cross-examined as to the basis of this opinion,—his knowledge of values in the locality. It was upon this cross-examination he stated that he knew of sales of other lots, and gave the price paid in one instance. The testimony was admissible for the purpose for which it was offered. *Winklemans v. Railway Co.*, 62 Iowa, 11; *Cummins v. Same*, 63 Iowa, 397. If this evidence had been offered as tending to show the value of plaintiff's lot, it would probably have been inadmissible, but this was not the case. The fact was elicited in an effort to ascertain the witness' knowledge of values. This distinction is clearly made in the last of the cases cited.

II. The other errors assigned are of such a character that they can best be considered together. Plaintiff's lot was taken by defendants April 25, 1896, and

both the instructions asked by appellants and those given by the court embodied the thought that the amount to be fixed by the jury was the fair market value of the property on this date. This we regard
2 as the correct rule. But it is claimed by appellants that the court erred in permitting witnesses who testified as to the value of the lot on that day to take into consideration the prospective location of the depot. And it is said the instructions given by the court are framed on the idea that this fact might be considered. We see no just ground for the complaint as to either of these matters. Many of the considerations that tend to affect the value of town property are prospective only. Select a lot in any city, find a witness competent to express an opinion as to its value, and ask him with relation thereto, and as to the basis of his judgment, and it will be found that the facts upon which his conclusions rest are anticipatory, largely. The business district is growing or extending towards it. It is particularly suitable for manufacturing purposes, or it is in a section that is rapidly improving. These are proper matters to consider, and they all relate, in most part, to future prospects. It was right for the jury to consider every fact that tended to give value to this property on the day it was taken. And, if the fact that a depot was likely to be erected in its vicinity had given it an added worth at that time, it was proper to consider this fact, even though the depot was to be erected by the railway companies that sought to take the property. If this were an action for damages, brought by a person to whom the owner had contracted to sell this lot, we think no one would contend that the prospective location of the depot should be excluded from consideration in fixing the value of the property. The measure of its value on the date mentioned should be the same for all. See *Sanitary Dist. v. Loughran*

160 Ill. 362 (43 N. E. Rep. 359). Our attention has been called to cases holding that the possible increase of value after the taking, because of the improvement, cannot be considered in fixing the value, and also to the rule that the general value of the property is the criterion, and not its value to the railway company for the special purpose designed. But we have seen no authority that contravenes the principle we have stated.

III. In the light of what has been said, we shall consider the objections made to the charge of the court. The second instruction was as follows: "You are instructed that the material question for you to determine is, what was the fair market value of lot 4 in block 26 in the city of Cedar Rapids, Linn county, Iowa, when it was taken by defendants, to wit, April

25, 1896? [and, in estimating said value from all
3 the evidence introduced on that question, you will not consider or deduct any benefit, if any you find plaintiff has derived, on account of any enhanced value that has accrued to plaintiff by reason of any contemplated building of the said depot.] Nor will you consider any enhancement in value of the said lot by reason of any building or improvement defendants may have subsequently erected on the lot; and consider only the fair market value of said lot when taken by defendants, as established to your satisfaction by the evidence." The language we have inclosed in brackets is assailed. It is said the jury might well have understood that, if they were not to deduct benefits or future accessions of value, they should add them. The language of the court is somewhat obscure, as applied to the issues in this case; but, whatever else it may be said to mean, it cannot, in view of its context, be given the construction which appellant places upon it. In this particular paragraph the jury is told expressly that the measure of plaintiff's damage is the fair market value of the lot at

the time it was taken, and that its enhancement thereafter in value must not be considered. And in the fourth paragraph this thought is emphasized in the following language: "In arriving at your value of this lot, you should not return a verdict based upon a speculative value, but solely at its reasonable market value at the time it was taken." We think, on the whole, the charge was correct, and that the defendants could not have been prejudiced by the phrase to which
 4 they except. There was no error in refusing to give the instructions asked by defendants, for the subject-matter was contained in the charge as given. The evidence as to the value of the lot is in conflict, but there is quite sufficient to sustain the amount fixed by the jury. For the reasons given the judgment will be **AFFIRMED.**

M. A. ILLSLY, Appellant, v. GEORGE L. GRAYSON.

105	685
138	635

Pleading: ACTION FOR RENT: *Set-off.* Plaintiff in an action for rent, being unable under Code, 1873, section 2018, to join other matter with his claim if he would effectuate his lien, is entitled to offset claims against the defendant in reply to the latter's counterclaim, under Code, 1873, sections 2666, 2667, providing that in such an action plaintiff may reply to the counterclaim by pleading any new matter not inconsistent with petition constituting a defense to the matter alleged in the answer, and that any number of defenses negative or affirmative may be pleaded to a counterclaim.

Appeal from Polk District Court.—HON. T. F. STEVENSON, Judge.

MONDAY, MAY 23, 1898.

ACTION at law, aided by an attachment, to recover rent for the use of agricultural lands. The defendant pleaded certain payments, and a counterclaim for work and labor done, property furnished, and other

miscellaneous items. To the counterclaim plaintiff pleaded a balance due him upon a note executed by defendant, and a miscellaneous account for work and labor done and material furnished, including the payment of a note upon which plaintiff was a surety for the defendant; and plaintiff asked that these items of indebtedness be offset against any indebtedness due defendant on his counterclaim. The case was tried to a jury, and the trial court instructed that the items set up in plaintiff's reply could not be used as an offset to claims due the defendant. The verdict and judgment were for defendant, and plaintiff appeals.—*Reversed*.

Dowell & Parrish and W. A. Spurrier for appellant.

Balliett & Stahl for appellee.

DEEMER, C. J.—The correctness of the instruction directing the jury to disregard the items pleaded in plaintiff's reply as an offset to the defendant's counterclaim is the sole question presented. In order to effectuate a lien for rent, the landlord must commence his action for rent alone within one year from the time the rent accrued. Code 1873, section 2018. In such action defendant may plead a counterclaim. Code 1873, section 2655. To such counterclaim plaintiff may reply by a general or specific denial, or by pleading any new matter, not inconsistent with the petition, constituting a defense to the matter alleged in the answer. Section 2666. "Any number of defenses, negative or affirmative, are pleadable to a counterclaim." Section 2667. These are all the statutes relating to the inquiry now before us; and it will be observed that while they do not mention either set-off or counterclaim, in referring to the reply, yet they do recognize that defenses, either negative or affirmative, may be

pleaded, provided the matter pleaded be not inconsistent with the petition. Plaintiff could not join the matters pleaded in reply with his action for rent; for the statute says the landlord's lien may be effected (that is, enforced) by action for the rent alone within a limited time. Defendant had the undoubted right to plead his counterclaim; but, if no set-off is allowed by way of reply, he may thus, after litigation ensues, apply any unsettled items of account to his obligation for rent, although he may at the same time be owing his landlord a much larger sum on general account. It may be that such a reply would not be proper in a case where the items included therein could have been embraced in the petition. But, where the statute expressly inhibits such a course, it certainly must be true that plaintiff may interpose in his reply, as a matter of defense, any set-off he may have to the defendant's counterclaim. See sections 2666 and 2667 of the Code, before quoted. Both parties argue the rule as to application of payments, although appellee contends—as we think, mistakenly, however—that such rule is only enforced in equitable proceedings. The pleadings do not disclose any such issue, and the evidence is in conflict as to there being a direction to apply, or, indeed, any application of, any of the items of counterclaim to the rent or other items of account. There being no application before suit was brought, the law will make it according to well settled rules, among which is that payments or credits will be applied to the unsecured, rather than the secured, account. *U. S. v. January*, 7 Cranch, 572; *U. S. v. Kirkpatrick*, 9 Wheat. 720; *National Bank of Commonwealth v. Mechanics' Nat. Bank*, 94 U. S. 437; *Backhouse v. Patton*, 5 Pet. 160; *Field v. Holland*, 6 Cranch, 8. Although we do not regard the rule as to application of payments controlling on the question of pleading, yet a statement of the doctrine contended for by appellee illustrates how the rule would be thwarted, should we hold

that, in an action of this kind, plaintiff could not plead in reply a set-off to the defendant's counterclaim. The cases of *Cox v. Jordan*, 86 Ill. 560; *Galligan v. Fannan*, 9 Allen, 192; *Mortland v. Holton*, 44 Mo. 58; *Miller v. Losee*, 9 How. Prac. 356; *Turner v. Simpson*, 12 Ind. 413; *Blount v. Rick*, 107 Ind. 238 (5 N. E. Rep. 898); and *Starke v. Dicks*, 2 Ind. App. 125 (28 N. E. Rep. 214) - seem to sustain the right to plead in reply a set-off to the defendant's counterclaim, provided there is no departure from the antecedent ground of complaint. See, also, Phillips Code Pleading, sections 270, 273. There was no error in directing the jury to disregard plaintiff's claim of thirty-six dollars for money paid in satisfaction of a note given by defendant to the Des Moines Oil Works, for the evidence did not show any such state of facts as would warrant an allowance of this item. There was evidence in support of some of the other items, however, and the court erred in not submitting the same to the jury under proper instructions. REVERSED.

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W. A. SMITH, Appellant, v. JOSEPH MILLER, R. I. GOLDEN, TEMPLE HILTON, E. FIELD, ROBERT NEIL AND J. S. STED, Original Defendants.

L. H. NOYES, Intervener, and JOHN H. NOYES, JOHN ROBINSON AND DOUGLAS STAMPER, Defendants and Appellants.

Public Lands. The act of congress granting swamp and overflow lands to the state passed September 28, 1850, and accepted by the state in 1853, was a grant *in presenti*, and the act of General Assembly 1853 vested the title in the same manner in the respective counties.

WATERS: Accretions. A purchaser of public lands bounded by a river is not entitled to the land added thereto by a change in the course of the river and not formed by accretion.

LADD, J., takes no part.

Appeal from Harrison District Court.—HON. F. R. GAYNOR, Judge.

FRIDAY, FEBRUARY 5, 1897.

ACTION in equity to determine and to quiet the title to certain lands in Harrison county as between the parties to this action. Decree was rendered dismissing plaintiff's petition, from which he appeals. Decree was also rendered against the defendants John H. Noyes, W. A. Robinson, and Douglas Stamper, from which they appeal.—*Reversed*. The issues and facts will sufficiently appear in the opinion.

J. S. Dewell and *Charles Mackenzie* for appellants: W. A. Smith, John H. Noyes, Douglas Stamper and John Robinson.

Jesse T. Davis and *S. H. Cochran* for appellees: Joseph Miller, R. L. Golden, Temple H. Hilton, E. Field, Robert Neil and J. S. Stead.

GIVEN, J.—I. This case relates to certain parts of townships 79 and 80, Harrison county. During the years 1851 to 1853 the United States caused a survey to be made of said townships, the western boundary of which was fixed by a meander line supposed to have been along the east bank of the Missouri river. In 1858, there being considerable land between said meander line and the Missouri river, the government caused the same to be surveyed into lots by one Davis, who established another meander line west of the former, and as the west line of his survey. There is now a considerable tract of land west of 'Davis' meander line and the present channel of the river. The lots platted by Davis were conveyed to the county under the swamp-land grant, and the plaintiff has title, through the county, to

lots 7, 8, and 9, in section 5, township 79, range 80, and 3 and 4 in section 4—79—80. The contentions between the plaintiff and the original defendants are these: Plaintiff claims that the land now lying west of Davis' meander line and the river, and in front of his said lots 7, 8, and 9, is a part thereof, as accretions thereto. Said defendants claim that the land platted by Davis was formed by gradual accretion to the lands as originally surveyed, and belongs to the owners thereof, and that therefore the government had no legal right to survey or make title thereto, and that for that reason plaintiff has no valid title to said lots 7, 8, and 9. They deny that the land lying between Davis meander line and the river was gradually formed, but allege that in 1865 the river suddenly changed its channel, cutting said land off from the Nebraska side. Intervener, L. H. Noyes, is the owner of certain lots in the original survey, by conveyance without reservation, from the United States, through state and county, under the swamp-land grant. His said lots are bounded on the west by the meander line established by said original survey, and he contends that all the land now lying between his said lots and the river belong to him as accretions to said lots, and that therefore the government had no right to convey the same. Plaintiff, as the owner of said lots 3 and 4, in section 4, and the defendants John H. Noyes, Robinson, and Stamper, owning other lots in said second survey, deny that any of said land surveyed by Mr. Davis was formed by accretions. They allege that the original survey was not extended to the river; that the land surveyed by Davis was in existence at the time of the original survey, and was omitted therefrom, and, therefore, proper to be surveyed and conveyed as it has been.

II. There is no controversy as to the law applicable to this case. It is not questioned but that accretions belong to and pass with the land upon which they

are cast, nor is it questioned but that, by conveying land, the government or individual conveys all right to accretions thereafter attaching to the land conveyed. It is contended on behalf of appellants that the general government had not conveyed the lots in the original survey, now owned by the intervener, prior to the second survey in 1858, and therefore had the right to survey and convey the land included in the Davis survey, even if it was formed by accretion after the first survey. It

will be observed that all the lands under notice
1 were swamp lands. The act of congress granting swamp and overflow lands to the states was passed September 28, 1850, and was accepted by the state in 1853. The courts have repeatedly held that this was a grant *in presenti*, and that the act of the general assembly in 1853 vested the title in the same manner in the respective counties. See *Bailey v. Callanan*, 87 Iowa, 108, and cases therein cited, and *Barrett v. Brooks*, 21 Iowa, 144. It is certainly clear that the general government, having thus parted with its title, had no right to convey the lands included in the Davis survey if they were formed by accretion. If that land was in existence at the time of the first survey, there is no question but that the government had a right to survey and convey it as was done.

III. Owing to the number of parties to this action, and their various interests and claims, the pleadings and proofs are quite voluminous, yet the controlling issues of fact are these: Was the land included in the Davis survey so formed as to constitute an accretion to the adjoining lands in the original survey? Was the land now lying between the meander line of the Davis survey and the present channel of the river formed by accretion, or was it severed from its former connection by a sudden change in the course of the river? The testimony as to the character and condition of these lands, and the action of the

river at and after each of these surveys, is voluminous and conflicting, and would require more space than should be given to set it out. We have studied it with care, and in the light of the respective claims and able arguments of counsel. It was the duty of these surveyors, in making those surveys, to have extended the lines to the river, and, in the absence of a showing to the contrary, we must presume that they did so. We think that it is shown by a preponderance of the evidence that the first survey was not extended to the then bank of the river, but was established with reference to a body of water known as "Home Schute." In times of high water there was a current from the river passing through Home Schute, and it is shown that the first survey was made at a time when the waters were high. It seems probable that Home Schute was taken for the channel of the river, but, be that as it may, it does appear that dry land lying east of Home Schute was not included in the first survey. The meander line of that survey only extended for a short distance along the east bank of Home Schute, and then bore eastward from it, thus omitting said dry land. The extent and condition of the land, as to timber and otherwise, included in the Davis survey, leave but little room to doubt that it was in existence substantially in its present form when the first survey was made. In coming to this conclusion we do not forget the fact that unusual changes do occur in the action of that river, but we do not think it is shown that the large body of land surveyed by Mr. Davis was, or could have been, formed by the gradual process of accretion during the short time that intervened between the two surveys. It may be that some small places within the Davis survey were formed by the action of the water, but they are not shown to be of any considerable extent, nor are the claims of the parties based thereon. Our conclusion is that the land included

in the Davis survey were in existence substantially in their present form and condition, at the time of the first survey; that they were omitted from that survey, and that the government had the legal right to survey and convey the same as it did. It follows that no part of this land belongs to the abutting lands within the first survey as accretions thereto, and that those having title to lots within the Davis survey are entitled to hold the same.

IV. We now inquire as to the lands between the meander line established by Mr. Davis and the present channel of the river. We are satisfied that Davis' survey was extended to the then east bank of the river, and that here again the quantity and condition of the land forbid the conclusion that it was formed by the gradual process of accretion. The evidence shows that,
2 some years after the Davis survey, the river suddenly changed its channel, whereby this land was severed from the Nebraska shore. Our conclusion is that neither of these parties owning land within the Davis survey is entitled to any part of this land as accretions, nor to disturb those in possession thereof. As each party asking relief bases his demand solely upon the claim of accretions to his land, and as we find that neither of them is entitled to such relief, their demands for relief should be dismissed, and the costs arising thereon taxed to the party asking relief. The decree of the district court is reversed, and the case will be remanded for decree in harmony with this opinion.—
REVERSED.

LADD, J., takes no part.

SUPPLEMENTAL OPINION.

MAY 23, 1898.

ACTION to quiet title, and a decree from which the plaintiff and certain defendants appealed.—*Reversed.*

J. S. Dewell and Charles MacKenzie for appellants.

Jesse T. Davis and S. H. Cochran for appellee.

Per Curiam. The questions of fact in this case are much confused. It is now before us on re-hearing, which we granted for a more careful review of the evidence. The result of our former consideration was a practical modification of the judgment of the court below, reversing the judgment only as to the intervenor, Noyes. The case has been re-argued and re-considered; five judges of this court having given the record a separate examination, besides an extended discussion in consultation. This extended and careful consideration of the case has served only to convince us of the correctness of our former conclusion. We regard our conclusions of fact as being in accord with the weight of the evidence, and the result seems entirely equitable. The former conclusion is adhered to, and the judgment as therein stated will stand REVERSED.

LADD, J., took no part.

ANDREW MARTIN V. ELIZA J. REESE, *et al.*, Appellants.

Opening Default. There was no abuse of discretion in denying a motion to excuse and set aside a default on the ground that the failure of defendants to enter their appearance was caused "by
2 some accident or oversight" on part of their attorney, where the affidavit failed to show what caused the alleged accident or oversight, or what care was taken to avoid such result.

SAME. A defendant who asks to have his default set aside must plead
1 issuably, and also present a reasonable excuse for the default.

Appeal from Polk District Court.—HON. T. F. STEVENSON, Judge.

TUESDAY, MAY 24, 1898.

THIS is an action commenced August 14, 1895, on two promissory notes secured by mortgage, and asking judgment and decree of foreclosure. September 16, 1895 (it being the seventh day of the term), upon legal notice given, a default was entered, and judgment and decree given accordingly. Thereafter, and on the twentieth day of September, 1895, the defendants filed a verified answer; and on the twenty-eighth day of October, 1895, they filed a motion, supported by affidavit, to set aside the default and decree because the same was erroneous, and because of facts appearing in the affidavit attached to the motion. Thereafter the defendants filed an amendment to their answer, and the court afterwards overruled the motion, and the defendants appealed.—*Affirmed.*

Balliet & Stahl for appellants.

Phillips & Brennan for appellee.

GRANGER, J.—The arguments deal largely with the case on its merits, as indicated by the issues made by the pleadings. We first meet the question whether the affidavit excusing the default is sufficient. In
1 such a case the party asking to have a default set aside must plead issuability, and also present a reasonable excuse for the default. *Joerns v. La Nicca*, 75 Iowa, 705. In such a case we do not interfere with

the action of the trial court except in clear cases of abuse of discretion. *Rogers v. Cummings*, 11 Iowa, 459; *Marsh v. Colony*, 36 Iowa, 603; *Browning v. Gosnell*, 91 Iowa, 448. The showing of excuse for the default is by

the following affidavit: "I, W. H. McHenry, on
2 oath, do state that I am the attorney for the
defendants in the above-entitled cause of action;
that I intended and attempted to enter my appearance
on the calendar of this court in each case in which I
was representing the defendants, so as to get the ten
days allowed for pleading by the rules of this court;
that by some oversight I failed to get my name entered
for the defendants in this case; that I made a list of
my cases in which I was to enter my appearance, and
went to the court house, and did enter my appearance
in all of said cases, except that by some accident or
oversight I omitted this case; that believing that I did
enter my appearance in this case, and in compliance
with the rules of this court, I did on the twentieth day
of September file the answer of the defendants in this
case, which is hereby referred to, and made a part of
this motion. W. H. McHenry." It is not to be said that
the affidavit is such a conclusive showing of diligence
that it was error not to so find. It does not appear what
caused the accident or oversight, or what care was
taken to avoid such results. All that is said in the affi-
davit can be true, and the accident or oversight be the
result of negligence. Admitting that the court might
have found diligence from the affidavit, it does not fol-
low that it should have so found. There was certainly
no abuse of discretion in denying the motion, and the
judgment must stand AFFIRMED.

THE CO-OPERATIVE SAVINGS & LOAN ASSOCIATION,
Appellant, v. MCINTOSH, *et al.*, Defendants, S. E.
IRISH AND THE KEOSAUQUA LUMBER COMPANY,
Appellees.

Agreed Facts: ESTOPPEL BY JUDGMENT. The effect of a decree foreclosing a mechanic's lien upon a mortgage is not waived by an
1 agreed statement of facts in an action involving the respective priorities of the mechanic's lien and the mortgage, which after reciting the recovery of a decree states that the only question to be decided is as to the priority of the lien.

Judgment: COLLATERAL ATTACK: *Notice by publication* A mortgagee cannot attack a decree foreclosing a mechanic's lien on the
2 mortgaged premises, rendered upon his default after publication of notice in an action to foreclose the mortgage, but his remedy is by a motion for retrial under Code, 1873, section 2677.

Appeal from Van Buren District Court.—HON. T. M. FEE, Judge.

TUESDAY, MAY 24, 1898.

ACTION upon a promissory note and to foreclose a mortgage securing it on a lot in Keosauqua. There was a default of all defendants save Irish and the Keosauqua Lumber Company, who set up a mechanic's lien as against plaintiff. Upon a hearing there was a decree, from which plaintiff and the two defendants mentioned appeal. Plaintiff's appeal being first perfected, it will be regarded and styled the appellant.—*Modified.*

P. A. Sawyer for appellant.

S. E. Irish and Sloan & Mitchell for appellee.

WATERMAN, J.—The defendant William M. McIntosh, being the owner of the real estate in question,

together with his wife, made a mortgage thereon to plaintiff, a corporation organized and existing under the laws of the state of South Dakota, on May 1, 1894. Thereafter the defendant the Keosauqua Lumber Company furnished material and labor to said McIntosh for the erection of a new and independent structure on the mortgaged premises. A mechanic's lien was duly filed against said real estate by the lumber company. This lien was afterwards foreclosed by decree rendered in the district court of Van Buren county, November 26, 1895. Plaintiff was made a party to the proceedings to foreclose, and was served with notice thereof by publication. Under this decree of foreclosure the lot in question was sold on special execution, March 28, 1896, to the defendant S. E. Irish, for two hundred and seventy-three dollars and eighty-eight cents. On August 24, 1896, plaintiff began this action to foreclose its mortgage, making, among others, Irish and the lumber company parties defendant. Among other allegations plaintiff sets out the proceedings in the foreclosure of the mechanic's lien and the sale thereunder to Irish, and it avers that it had no notice or knowledge of such proceedings; that said mechanic's lien is subject to its mortgage; and asks that the sale to Irish be set aside and the lien of its mortgage be decreed prior and superior to any interest of said Irish or the Keosauqua Lumber Company. Irish and the lumber company answered this petition. They assert that plaintiff was duly notified by publication of the original notice of the pendency of the action for the foreclosure of the mechanic's lien, and they deny its right to priority. On October 2, 1896, plaintiff obtained a decree against all the defendants save Irish and the lumber company, and as to them, the cause was continued. On November 23, 1896, an agreed statement of facts was filed, reciting: "For the purpose of final disposition of the above entitled case, it is agreed between

the plaintiff and the Keosauqua Lumber Company and S. E. Irish, contesting defendants, as follows." Then follow the facts as already given: (1) As to plaintiff's mortgage. (2) As to defendant's mechanic's lien. (3) A statement that the material and labor were furnished after the date of the mortgage and for the building of a new house. (4) A recital as to the sale under foreclosure of mechanic's lien. (5) A statement that plaintiff was a non-resident of the state of Iowa, and was served with notice of the action to foreclose the mechanic's lien by publication. (6) A statement that when plaintiff took its mortgage the land was vacant and unimproved; that the lumber company furnished material and labor for a new house which was erected thereon, and which "can be removed therefrom without injury to the land." (7) It is agreed that at the September term of court plaintiff obtained judgment against the other defendants, "and the only question to be decided as between the parties hereto is the granting or refusing plaintiff's prayer that the lien on said premises may be decreed to be paramount and superior to the lien of the Keosauqua Lumber Company and said S. E. Irish, and, if plaintiff's said mortgage shall be declared prior and superior to the lien of the Keosauqua Lumber Company and S. E. Irish on the lands, it is to be determined by the court whether it is also a superior lien on the said house to the lien of the Keosauqua Lumber Company and S. E. Irish. And the cause is submitted to the court for final determination and decree on the pleadings and this agreed statement of facts." On December 9, 1896, Irish filed an amendment to his answer, averring that he was a purchaser at said sheriff's sale in good faith and for value. Thereafter the court rendered its decree setting aside as against plaintiff the sale to Irish, and enjoining the issuance of a sheriff's deed to him. It gave plaintiff a first lien on

the real estate, and the lumber company a first lien on the building, which it was authorized to remove within thirty days, and ordered execution to issue to the respective parties to enforce the rights so given. Each party excepted.

II. The plaintiff appeals from so much of the decree as gives the lumber company a first lien on the building and a right to remove it. Inasmuch as plaintiff's contention in this regard is involved in the next issue which we shall consider, we will devote no further attention to it in this place.

III. Defendants Irish and the lumber company make the point on their appeal that plaintiff's only right, as against the judgment in favor of the lumber company, was a right of re-trial on motion, under
2 section 2877 of the Code of 1873; and they insist that their rights under such judgment cannot be attacked in an independent action, as is attempted in this case. We think this position sound. Indeed, it does not appear that plaintiff seriously questions it. An attempt, however, is made to avoid this issue by the claim on the plaintiff's part that defendants did not plead the judgment in estoppel, and that, if they did, such plea was impliedly waived by the agreed statement of facts on which the case was submitted. Neither of these claims seems to us well founded. The judgment was set up in defendants' answer, and also in the agreed statement of facts. The only support, if we may call it such, for the claim of waiver on plaintiff's part, that we can discern in the record, is to be found in the seventh paragraph of the statement of facts, which we have heretofore quoted. It is thought by plaintiff that by its terms this paragraph limits the trial court to a finding as to the rights of the parties under their original liens. We do not so construe the language used, nor do we think such interpretation can reasonably be

given it; certainly not when its context is considered. In preceding paragraphs the facts as to the judgment in favor of the lumber company, and the execution sale under it, had been fully set out, and in the paragraph in question the two liens, as they had been previously described, are submitted to the court, in order to secure a decision as to their relative standing. It is not reasonable to suppose that defendants' judgment would have been recited, if nothing was to be claimed for it. We do not think we can make this point any clearer than is done in our statement of the case, where the facts are fully set out. Our conclusion is that the judgment of the lumber company must be held good, and that plaintiff cannot question the superiority of defendants' rights in a proceeding of this character. On plaintiff's appeal the decree will be affirmed; on defendant's appeal, so far as it adjudged plaintiff's lien to be superior to the interest of defendant Irish in said real estate and enjoins the execution of a deed to him, it will be REVERSED.

JOSEPH WOOD, Appellant, v. Z. T. DUNHAM AND EMMA L. DUNHAM.

Suit on Note: PERSONAL JUDGMENT. The defense of a married
 1 woman, sued jointly with her husband on a note and mortgage
 8 made by them, that she signed for the purpose of relinquishing
 her dower only, is not sufficient to prevent the recovery of a personal judgment against her.

Appeal: OBJECTIONS BELOW. A motion by plaintiff for a judgment
 against both defendants upon the referee's finding that the female
 defendant signed the note in suit and the mortgage securing the
 4 same for the sole purpose of relinquishing her dower interest is
 sufficient to save for the purposes of appeal, the objection that her
 answer averring that she signed only for such purpose but which
 did not plead fraud or mistake or ask reformation was insufficient.

SAME. Plaintiff cannot urge for the first time on appeal that the
 defendant's answer did not constitute a defense where it was

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- 2 treated as sufficient by both parties in the court below notwithstanding Acts Twenty-fifth General Assembly which provides that no pleading shall be held sufficient on account of failure to demur thereto; and strikes from Code, 1873, section 2659, the provision that if no objection is taken to a pleading it shall be deemed waived.

Appeal from Crawford District Court.—HON. S. M. ELWOOD, Judge.

TUESDAY, MAY 24, 1898.

ACTION at law upon a promissory note executed by defendants, Z. T. Dunham and Emma L. Dunham, who are husband and wife. The defendants filed an answer and cross-petition in equity, Z. T. Dunham pleading
1 ing payment and an unsettled account against the plaintiff, and Emma L. Dunham admitting the execution of the note, and further pleading that the note was secured by a mortgage upon real estate, and that she signed both note and mortgage for the sole purpose of relinquishing her dower in the lands covered by the mortgage. The counterclaim was for expenses incurred in defending against plaintiff's claim. The only affirmative prayer for relief is a money judgment upon the counterclaim. In reply plaintiff denied that Emma L. Dunham signed the note simply to release her dower in the land, and further pleaded that she signed the same "as additional security, to gain an extension of time." The cause on the issues thus joined was, on defendants' motion, referred to a referee to take and report the testimony and make a finding of fact. The referee so appointed made his report, finding that no part of the note had been paid, and that Emma L. Dunham signed the note and mortgage for the purpose of releasing her statutory right in the land. The plaintiff moved for judgment against both defendants on this report, but the motion was overruled, and the

court entered a judgment against Z. T. Dunham for the full amount of the note, and dismissed the petition as to Emma L. Dunham. Plaintiff appeals.—*Reversed*.

MacKenzie, Brockett & Dewey and *S. E. Wilmot* for appellant.

M. B. Baily and *J. A. Trarer* for appellees.

DEEMER, C. J.—Defendants moved to transfer the case to the equity side of the calendar. This motion was submitted, but does not appear to have been passed upon. The case did not present any matters of equitable cognizance, and the reference was practically by consent,— as no objection was made or exception taken to the order.

The case was not of equitable cognizance, and the findings of the referee have the force and effect of the verdict of a jury, and, as no exceptions were taken to these findings, the sole question for solution is whether the plaintiff was entitled to judgment against Emma L. Dunham upon the facts found by the referee when applied to the issues presented by the pleadings.

2 No direct attack was made upon the pleadings filed by the appellees, and down to the time appellant filed his motion for judgment all parties seem to have treated the facts pleaded in answer as a good defense to appellant's petition, although neither fraud nor mistake was pleaded nor reformation asked. The motion was based upon the ground "that the defendants both signed the note, and the evidence shows that the said Mrs. Z. T. Dunham signed the note for a good and valuable consideration; and, further, because, on the whole record, the said Mrs. Dunham should be held liable for her signature to the said note." If this case had been tried prior to the time chapter 96, Acts Twenty-fifth General Assembly took effect, there would

be no doubt of the correctness of the decision; for prior to that time it was uniformly held that if matter pleaded as a defense is not attacked by motion or demurrer, and there is testimony to sustain it, it will defeat the action, although it may not amount to a legal defense. *Benjamin v. Vieth*, 80 Iowa, 149; *Bank v. Zeims*, 93 Iowa, 140. The case was tried after the enactment of the twenty-fifth general assembly, which made a change in the statute under which these decisions were rendered. This statute, in effect, provides that no pleading shall be held sufficient on account of failure to demur thereto; and strikes from section 2650 of the Code of 1873 this sentence: "If no objection is taken to it [the pleading], it shall be deemed waived." In construing this act of the general assembly, we held in the case of *Weis v. Morris*, 102 Iowa, 327, that, notwithstanding the provisions of the law, the insufficiency of the pleadings could not be raised for the first time in this court, and that if the parties treated the matter pleaded as a good defense in the trial court they could not come to this court and

insist that the answer did not constitute a
3 defense. To cite authorities for the proposition that these matters pleaded in the answer of Emma L. Dunham did not constitute a defense is wholly unnecessary. We have, then, simply this question: Was the insufficiency of the pleading presented to the trial court? An examination of the motion leads us to the conclusion that the question was properly raised. The record shows that appellee Emma L. Dunham signed the note with her husband, that the note is unpaid, and that plaintiff is entitled to recover although she signed the note, as the referee found, simply to release her
dower in and to the mortgaged premises. The
4 motion was grounded upon the thought that, considering the whole record showing these facts, plaintiff was entitled to recover. Such motion

would, of necessity, present the question as to the sufficiency of the defense. The trial court held that plaintiff was not, as a matter of law, entitled to a judgment against the wife, because of the matters pleaded in answer, found by the referee to be established by the evidence. In this we think there was error. The judgment is REVERSED.

LYDIA A. GRAHAM V. THE TOWN OF OXFORD, Appellant.

Defective Sidewalk: JURY QUESTION. It cannot be said as a matter

- 1 of law that a town is not liable for a defect in a sidewalk, consisting of a loose plank, because it contains a population of only five or six hundred people.

SAME. The question whether a defect in a sidewalk was of a character

- 1 sufficient to constitute negligence on the part of the town and whether the defect had existed for such a length of time before an accident occasioned thereby that the defendant should be charged with knowledge of it are questions of fact and not of law.

SAME. The jury was authorized to find that plaintiff was not negli-

- 1 gent, where it appeared that, on reaching a point where one portion of the sidewalk was lower than the other, she stepped carefully on a board on the lower portion, which slipped, throwing her to the ground, and that such accident occurred on a dark evening, with
- 4 no lights near the defect in question.

Contributory Negligence: A person who knows of a defect in a walk but that it can be passed in safety by the exercise of ordinary care and is justified as a reasonably prudent man in holding that belief, is not guilty of contributory negligence in attempting to

- 3 pass over in an ordinarily careful and prudent manner.

RULE APPLIED: An instruction that if the fall of plaintiff was caused by a loose plank on the sidewalk as claimed, then it would be necessary for the jury to determine whether defendant was negligent, and whether plaintiff was in the exercise of ordinary care, was not erroneous because of the admitted fact that plaintiff knew of such defect before the accident and could have avoided

- 3 such danger by going another way.

Instructions: ORDINARY CARE DEFINED: An instruction that there is no absolute test in determining what is ordinary care but it may be considered to be that degree of care which an ordinarily reasonable man would exercise under like circumstances, in view of

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119	58
105	705
123	448
105	705
124	482
105	705
125	206
105	705
128	511

all the facts existing at the time, is not misleading because of the apparent conflict between its different parts, and such an instruction states the law with substantial accuracy.

Appeal from Johnson District Court.—HON. M. J. WADE,
Judge.

TUESDAY, MAY 24, 1898.

ACTION at law to recover for injuries alleged to have been caused by negligence on the part of the defendant. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendant appeals.—*Affirmed.*

*Ewing & Maloney and Remley, Nye & Remley for
appellant.*

Joe A. Edwards and Baker & Ball for appellee.

ROBINSON, J. In the evening of the first day of April, 1894, the plaintiff fell on a sidewalk of the defendant, and received the injuries for which she seeks to recover. About ten days before the accident occurred a new sidewalk was built in front of the premises of one Mrs. Scanlon. That walk was a continuation of an old walk in front of the premises of one Windrem, and at the place where they were connected the new walk was a few inches higher than the old one, the difference in height being variously estimated by witnesses at from two to eight inches. The plaintiff claims that it was from four to six inches, and that at the time of the accident a two-inch plank about six inches wide and five feet long had been placed across the end of the lower walk, next to the end of the other, in such a manner as to make a low step; that she was walking along the Scanlon walk, and when she reached

the place in question she stepped upon the board described, and it slipped and she was thereby thrown to the ground at the side of the walk, which was from two to three feet lower than the walk; and that her injuries were caused in that manner. There is much evidence on the part of the defendant which tends strongly to show that the board described by the plaintiff was from ten to twelve inches in width, that it was securely nailed to the walk, and that its surface was but little lower than that of the Scanlon walk. Some of the evidence for the defendant also tended to show that the plaintiff did not fall at the junction of the two walks but five or six feet from it. There was much conflict in the evidence respecting these matters, and the finding of the jury as to them, for either party, would not have been unsupported by the evidence.

I. The appellant argues that a town containing but five or six hundred people is not required to repair such a defect in its walks as that in question, and that the court erred in giving a portion of its charge
1 which required the jury to determine whether the defect was of a character to constitute negligence on the part of the defendant, and whether it had existed for such a length of time that the defendant should be charged with knowledge of it before the accident occurred. Both of the questions thus submitted were of fact, and not of law, and the court did not err in requiring the jury to answer them. It was said in *Baxter v. City of Cedar Rapids*, 103 Iowa, 599, that "whether an obstruction or other defect in a walk is of a character to make the municipality which permits it to exist responsible for it does not necessarily depend upon the size of the defect, but upon the effects which may reasonably be apprehended from it upon persons who use the walk in a proper manner. These will vary with the circumstances of different cases, and

whether the municipality is liable for a defect in its streets or walks will, as a rule, be a question of fact, to be determined by the jury under the instructions of the court, and not a mere question of law, to be determined by the court alone." See, also, *Ledgerwood v. City of Webster City*, 93 Iowa, 726; *Patterson v. City of Council Bluffs*, 91 Iowa, 732. It cannot be said, as a matter of law, that the defendant, because of its small population, is not liable for the defects in question.

II. The eighth paragraph of the charge to the jury is as follows: "In determining what is ordinary care, there is no absolute test, but it may be considered to be that degree of care which an ordinarily reasonable man would exercise under like circumstances, in view of all the facts existing at the
2 time." The appellant complains of this on the ground that the first part of it states that there is no absolute test of ordinary care, and that the last part gives an absolute rule for determining what it is. We think the conflict, if any, between the different parts of the paragraph is more apparent than real. Taken as a whole, it means that there is no fixed rule for determining what is ordinary care, applicable to all cases, but that each case must be determined according to its own facts, and the general rule to that effect is stated. The jury could not have misunderstood the meaning of the paragraph, and it stated the law with substantial accuracy.

III. The court charged the jury that if the fall of the plaintiff was caused by a loose plank, as claimed, then it would be necessary for the jury to determine whether the defendant was negligent in having the plank in that position, and whether at the time the
3 plaintiff fell she was in the exercise of ordinary care. The appellant insists that this was erroneous, because the plaintiff admits that she knew of the defect before the time of the accident.

and the evidence shows that she could have avoided danger from it by going another way. But it is not true that one who knows of a defect in a walk is necessarily guilty of negligence if he attempt to pass over it. Much depends upon the character of the defect, the occasion for passing over it, and the care used in doing so. If a person knows of a defect in a walk, but believes that it can be passed in safety by the exercise of ordinary care, and he is justified as a reasonably prudent man in holding that belief, he is not negligent in attempting to pass over it in an ordinarily careful and prudent manner. *Nichols v. Town of Laurens*, 96 Iowa, 388; *Barnes v. Town of Marcus*, 96 Iowa, 675. We think the paragraph of the charge in question is not vulnerable to the objection made. Other portions of the charge are criticised, but we find them to be substantially correct.

IV. The accident occurred at about nine o'clock in a dark evening. There were no lights near the defect in question and the walk was frosty. The plaintiff states that when she reached the defect she stepped down upon the board on the lower part of the walk; that the board slipped, and she was thrown to the ground; and that in stepping down she stepped
4 slowly and carefully. We are of the opinion that the jury was authorized to find, from all the facts disclosed by the record, that the plaintiff was not negligent. There is ample evidence to show that the defendant should be charged with notice of the defect in time to have prevented the accident. We do not find any error in the rulings of the district court, nor cause for disturbing its judgment, which is therefore **AFFIRMED**.

MARY MOEHN, Appellant, v. MARTIN MOEHN.

105	710
120	76
105	710
122	570

Evidence: REBUTTAL. The testimony of plaintiff in an action on a promissory note which is in the possession of the maker, to the effect that the defendant obtained the note from her by fraud without paying the same, is not admissible in rebuttal of defendant's testimony that he paid and took up the note, where she rested her case in chief upon evidence that the note was transferred to her by the original payee, and that she never transferred it and that the defendant never paid it to her, without offering any evidence to support the allegation of her petition that the defendant obtained the possession of the note by fraud, except

1 as it may be inferred from the statement that he had not paid it to her. Such evidence on her part was essential to her recovery and a part of her main case and she cannot introduce it on rebuttal for the first time, even though it tended, in some degree, to

2 rebut defendant's evidence.

DELIVERY BY INDORSEMENT: *Presumption.* Plaintiff in an action upon a negotiable promissory note, indorsed by the payee, is

4 bound to show that it was delivered to her by the payee with the intention of transferring the title, and she cannot rest upon the legal presumption of delivery arising under the statute from the

5 indorsement alone, where the note is in possession of the defendant and it is denied that it was ever delivered to her

SAME: *Instructions.* An instruction that a presumption of ownership arises from possession of a note indorsed by payee, and, while so possessed, without further evidence, is not in conflict with the foregoing rule as to presumptions arising under statute. The statutory presumption would govern if plaintiff possessed the

5 note, and this instruction applies properly to such time as it may have been in her possession

DECLARATIONS OF ONE DECEASED Where it is not shown that the maker of a note was insolvent, declarations of a deceased payee

1 and indorser that the note had not been paid, and was the property of his wife, made after he had parted with all interest therein, are not competent, as being against his pecuniary interest;

2 and this is so notwithstanding that declarant was still under a contingent liability as indorser of the note.

Appeal from Des Moines District Court.—HON. JAMES D. SMYTH, Judge.

TUESDAY, MAY 24, 1898.

PLAINTIFF states, as her cause of action, in substance, as follows: That on August 19, 1892, the defendant executed his promissory note for one thousand five hundred dollars, payable "to Henry Moehn, Sr.," sixty days after date with six per cent interest; that said note was endorsed, "Henry Moehn. August 21, 1892," and delivered to her; that it has never been transferred by her; that it is still her property, and is due and unpaid; that, without consideration or payment, and by fraud and false representations, the defendant obtained said note from plaintiff, promising and agreeing to return the same, which, upon demand, he fails and refuses to do. Plaintiff asks judgment for the amount of said note. Defendant admits the execution of the note, and denies every other allegation in the petition. He alleges that about the tenth day of November, 1892, he, without any knowledge of said alleged indorsement, and in the presence of plaintiff, paid said note in full to Henry Moehn, Sr., who then and there had possession of and surrendered said note to the defendant, without objection or claim being made by the plaintiff. On January 25, 1896, the jury found for the defendant, and found specially that Henry Moehn did not in August, 1892, endorse his name on said note, and deliver it to the plaintiff; that she did not retain possession of it until some time after December 1, 1892; and that it was delivered to the defendant in November, 1892. On the same day the court granted plaintiff thirty days to file a motion for a new trial, and rendered judgment on the verdict; on April 6, 1896, the court overruled plaintiff's motion for a new trial; and on August 31, 1896, the plaintiff served and filed a notice of appeal.—*Affirmed*.

Power, Huston & Power for appellant.

S. L. Glasgow for appellee.

GIVEN, J.—I. Appellant's motion to strike appellee's additional abstract, and appellee's motion to dismiss this appeal, have been heretofore overruled, and the case is now for consideration as presented in the abstracts. The assignments are that the court erred in excluding certain testimony of the plaintiff and of one C. F. Boesch, and in giving the fourth and fifth paragraphs of the instructions. Plaintiff, to sustain her action, called her daughter, Anna Hauser, who testified: That about August 20 or 25, 1892, Henry Moehn, Sr., was at her mother's home, with her mother, downstairs. That they called her, and that "Mr. Moehn took the note, and said, 'This is your mother's, if she agrees to marry me.' They were married about a week later. Mr. Moehn is now dead." Plaintiff testified in her own behalf that in August, 1892, the note was delivered to her; that it was indorsed by Henry Moehn, Sr., at the time of the delivery; that it remained in her possession until May, 1893; that she never sold or transferred the note; and that Martin Moehn never paid the note to her. It does not appear that any other evidence was offered in chief on behalf of the plaintiff. The defendant testified in his own behalf that the note was surrendered to him by his father, Henry Moehn, Sr., in November, 1892; that Mary Moehn was present at the time, and made no objection to the delivery of the note, and no claim that she owned the note, or had any interest in it; that he then, in the presence of said persons, marked the note, in ink, as paid, and erased his name by pen mark drawn through it; and that the note was in his possession from then until January, 1894, when, as a witness in another trial, he produced it, and gave it to the reporter. John M. Mercer, called by the defendant, testified: That about the last of March or the first of April, 1893, he went to Henry Moehn's house to make

a collection, and that Mr. and Mrs. Moehn were both present. That Mr. Moehn said he could not pay him, and that he (Mercer) then asked for this note, and that they both said they had no such note. That Mary Moehn said that she had no such note,—had no note on Martin Moehn; that Martin did not owe her or her husband anything; and that the note had been paid. Plaintiff was then called in her own behalf in rebuttal; and having testified that she had this note during November and December, 1892, and that she gave it up in May, 1893, the following occurred:

2 “Ques. State whether or not in May, 1893, you had any conversation with Martin Moehn, the defendant, in relation to this note; and, if so, state when it was, and what was said and done. (Objected to as incompetent, irrelevant, and immaterial; not proper rebuttal. Objection overruled, and defendant excepts.) Ans. She claims that Martin Moehn came there, and asked to see the note,—called her to the sitting room. When she showed it, took note out of her hands. (Defendant objected to the answer as incompetent, irrelevant, and immaterial, and not rebuttal. Objection sustained, and plaintiff excepts.)” (This testimony was given through an interpreter; hence the answers are given in the third person.) We have the single question whether this answer was proper rebuttal. Plaintiff not having possession of the note sued upon, and it being confessedly in the possession of the defendant, the presumption is that it has been paid; and the burden is upon the plaintiff to overcome this presumption by sustaining the allegations of her petition as to how the defendant came into the possession of the note. So far as appears, she rested her case in chief upon evidence that Henry Moehn said the note was hers if she agreed to marry him, and that they were married about a week later; that she kept the note until May, 1893; that she never

transferred it; and that the defendant never paid it to her. She did not offer a syllable of evidence to support the allegation that defendant obtained possession of the note by fraud, except as it may be inferred from the statement that he had not paid the note to her. While her statement that defendant asked to see the note, and, when shown it, took it out of her hands, in May, 1893, does tend to rebut the defendant's testimony that he had taken up the note from his father in November, 1892, yet it was so clearly evidence that should have been offered in chief that we think it was not proper rebuttal. If there had been any evidence offered in chief on this point, we might say otherwise; but plaintiff could not withhold evidence upon this point, essential to her recovery, and present it for the first time in rebuttal, even though it did tend in some degree to rebut the evidence of the defendant. We think there was no error in this ruling.

II. The next assignment of error presents the question whether the declarations of Henry Moehn, deceased, made in 1894, in the absence of the defendant, that the note had not been paid, and that his wife was the owner of it, were admissible
3 in evidence against the defendant. Plaintiff's counsel cite section 147, 1 Greenleaf Evidence, and *Mahaska County v. Ingalls*, 16 Iowa, 81. In that case this court held that, to render such evidence admissible, it must appear that the declarant was dead, that the declaration was at the time against his pecuniary interest, that it was of a fact or facts of which he was immediately and personally cognizant, and that "the court should, upon the circumstances of a particular case, be satisfied that there was no personal motive to falsify the fact declared." Whether the claim of the plaintiff or that of the defendant concerning this note be true, it certainly appears that Henry Moehn had parted with all

interest in that note as payee thereof. It is insisted, however, that he was liable to the plaintiff as indorser. Let this be conceded; yet we do not think that his statements that the note had not been paid, and that it belonged to his wife, were so against his pecuniary interests as to render them admissible as evidence. They were surely in the interests of his wife, and therefore, to some extent, in his own interest. If it was shown that the defendant was insolvent, there would be some reason for saying that the declarations were against the pecuniary interests of the deceased, in view of his indorsement of the note; but under the facts, we think there is no such showing of adverse pecuniary interests, nor of the absence of motive to falsify the fact, as to render this evidence competent.

III. The court instructed that, the execution and the indorsement of the note being undisputed, the questions to be determined were, whether the note, while his property, was transferred by Henry Moehn, Sr., to the plaintiff, and whether the defendant made payment of the note to Henry Moehn, Sr., without notice of its transfer to plaintiff, or of her claim to, and interest in, it. The court further instructed that, as to the first question, the burden was upon the plaintiff to establish by a preponderance of the evidence that the note in suit was transferred to her by

Henry Moehn, Sr., while he was the owner of
4 it, "with the intention on his part by such delivery to transfer the title of the said note to the plaintiff; and, if the plaintiff has failed to so establish the transfer of the said note to her by a preponderance of the evidence, your verdict must be for the defendant, without regard to the questions arising as to the defense of payment set up by the defendant." Plaintiff contends that, as non-negotiable instruments are transferable by indorsement thereon, it was error to instruct that the indorsement and delivery, to pass,

title, must have been with the intention of the payee to thereby transfer the title to the plaintiff. It is insisted that this instruction adds to the statute, that makes indorsement and delivery sufficient, the requirement that it was the intention on the part of the indorser, by delivery, to transfer the title. If plaintiff had brought this action upon the note as in her possession, these contentions would apply; but the question of delivery to her was in issue, and she was without possession as evidence of ownership. Her ownership was denied. And under these circumstances, and her relation to the payee, it was incumbent upon her to show an intention on the part of the payee to transfer the title of the note to her. She was not suing merely by virtue of a legal title, or as trustee, but as absolute owner of the note. After stating that

5 the burden of proof as to the possession of the note might be changed, the court instructed that the possession of this note would afford a presumption of ownership in the party in possession, and that if the jury found that this note was indorsed in blank, and while so indorsed was held in the possession and under the control of the plaintiff, "this fact would create a presumption that she was the lawful owner of the note while it was so held in her possession, and would relieve her from the necessity of adducing other evidence to sustain her claim of ownership at the time in question, unless the presumption thus arising was rebutted or overcome by other evidence explaining or accounting for her said possession." Plaintiff's counsel insist that this is in conflict with what we have quoted from the prior instruction; but not so, we think. What is said in this last instruction as to presumption arising from possession is limited to the time, if any, that the jury might find the plaintiff was in possession of this note. If she was

suing upon this note as in her possession, this instruction would be correct, and all that the case would call for; but not having possession, and her ownership being disputed, the fourth instruction was correct, and the fifth consistent therewith, as applied to any possession the jury might find that she previously had. We discover no error prejudicial to appellant, and the judgment of the district court is therefore **AFFIRMED**.

D. W. HART V. NATIONAL MASONIC ACCIDENT ASSOCIATION, Appellant.

Insurance: CONTRACT CONSTRUED. The weekly indemnity for loss of time and the indemnity for loss of a foot provided in a certificate of accident insurance may both be recovered, although they result from the same accident, if the total indemnity does not exceed the limit fixed by the terms of the contract.

ASSESSMENT: *Judgment for fixed sum.* A judgment at law may be rendered for the fixed amount provided by a certificate of accident insurance notwithstanding a provision that the indemnity shall not exceed the amount to be realized from one quarterly assessment from the members of the association at the date of the accident, if it appears from other provisions that such assessment though limiting the amount of the indemnity does not furnish the sole source of its payment; and it is incumbent upon the association to plead and show the fact that an assessment would not produce such amount if it seeks to reduce the recovery on that ground and it is not necessary for the insured, in the first instance, to compel the association to make an assessment even though it shows that it has no funds in its possession with which to pay the amount due.

MISREPRESENTATION OF CALLING: *Knowledge of insurer.* A certificate in an accident insurance association is valid and will take effect according to its terms notwithstanding that the insured was engaged in a more hazardous employment than those included in the class in which he was insured where the certificate was issued with knowledge by the insurer of the character of the insured's employment, but with the understanding that he was to change his occupation, and the insured had abandoned the more dangerous occupation before the accident, although he had not commenced the new employment.

NOTICE: *Pleading.* The sufficiency of the notice given to an accident insurance association in compliance with a by-law was not put in

105	717
106	892

105	717
119	174
119	176
119	266

105	717
121	60
121	730
121	731
122	266

105	717
134	578

- issue in an action upon the insurance certificate, tried while code 1873, section 2715, was in force, by a general denial of the petition which averred that the plaintiff had complied with all the conditions and provisions of the articles and by-laws to be kept and performed by him, and in view of the provision of that section
- 2 that in pleading the performance of conditions precedent in a contract, it is not necessary to state the facts constituting such performance, but the party may state generally that he has duly performed all the conditions on his part, and section 2717, providing that if either of the allegations contemplated in the three preceding sections is controverted, it shall not be sufficient to do so in terms contradictory of the allegations, but the facts relied on shall be specifically stated.

Compromise and Settlement. The sending of a check payable to a creditor, to a bank, with directions to deliver the same to the creditor and to obtain his signature to an enclosed receipt, in

1 response to a letter from a creditor that he would accept a check for a specified amount in full of his claim, without directions to send it to the bank, does not constitute a settlement where it does not appear what disposition of the check was made by the bank.

Appeal: CONDITIONAL AFFIRMANCE. When the jury is not directed to allow interest and it may be ascertained from the verdict that interest in a certain sum is included, the district court should on motion for new trial, grant same unless the said sum is remitted,

7 and if this be not done this court may, on appeal, order an affirmance conditioned upon a remittitur of said sum and that if the sum be not remitted the judgment be affirmed with a modification reducing the judgment by a deduction of said interest.

HARMLESS ERROR. Pleading. Error in permitting plaintiff in an action on a policy of accident insurance to testify that he had

5 read the certificate and the articles of incorporation and by-laws of the association and had complied with all of them is not prejudicial where the averment in his petition that he had complied with all the conditions precedent was not sufficiently denied in the answer.

Appeal from Polk District Court.—HON. W. A. SPURRIER, Judge.

TUESDAY, MAY 24, 1898.

ACTION at law on a certificate of membership issued by the defendant. There was a trial by jury

and a verdict and judgment for the plaintiff. The defendant appeals.—*Reversed*.

Clark Varnum for appellant.

Berryhill & Henry for appellee.

ROBINSON, J.—On the sixteenth day of August, 1893, the defendant issued to the plaintiff the certificate of membership in suit. It purported to provide for the payment to the plaintiff of weekly benefits in case of his disability while it was in force, and for the loss of a foot, and for other results of accidents, which need not be mentioned. On the twenty-sixth day of October, 1893, the plaintiff, while in Chicago, fell in front of a street car. It passed over him, cut off his left foot, and seriously injured the other. He claims that he was continuously disabled by the accident for a period of forty-nine weeks; and seeks to recover one thousand, two hundred and twenty-five dollars for that disability and two thousand, five hundred dollars for the loss of the foot, with interest on both sums from the first day of October, 1894, at the rate of six per cent. per annum. The judgment rendered was for the sum of four thousand, three hundred and forty-nine dollars and forty-seven cents, besides costs.

I. Soon after the accident, the plaintiff notified the defendant of it, and filed proofs of the injuries received. On the twenty-first day of February, 1894, the plaintiff signed, and delivered to an officer of the defendant, a writing, of which the following is a copy: "Dodge City, Kansas, 2-21, '94. To the Executive Committee of the National Masonic Accident Association—Gentlemen: If you will send check for six hundred dollars, payable to my order, within one week from this date, I will give you rec't in full of all claim I have against said association. 2d. If the above is

not agreeable, I request that you waive the arbitration clause in the certificate of membership. 3d. If agreement No. 1 is accepted, the association to not make it public for twelve months. D. W. Hart."

1 On the twenty-sixth day of the same month the defendant mailed to the cashier of the First National Bank of Dodge City a check for six hundred dollars, payable to the plaintiff, with a letter which directed the cashier to deliver the check to Hart, and to obtain his signature to a receipt which was also inclosed. On the same day the defendant mailed a letter to the plaintiff, informing him of what had been done, and requesting him to call at the bank and receive his money. The defendant pleaded this transaction as a settlement, and complains because the court refused to submit any question respecting it to the jury. The writing did not authorize a delivery of the check by sending it to a bank; and the evidence does not show whether the bank received the check, nor what became of it. An employe of the defendant, who mailed it and the letter to the bank, states that she does not think the defendant has the original letter or receipt, and that she has never seen them since they were sent out; but she does not state that she would have seen them had they been returned, and does not say that she has not seen the check. The check may have been returned to the defendant, but, however that may be, it does not appear that it was ever tendered to the plaintiff. The evidence merely showed a proposition for settlement, and an acceptance, but fails to show payment. That was not sufficient to constitute a defense to this action. See *Bradley v. Palen*, 78 Iowa, 126; *Hall v. Smith*, 10 Iowa, 45. The district court therefore properly withdrew the question of settlement from the consideration of the jury.

II. The certificate was expressly made subject to all the conditions and provisions of the articles of incorporation and by-laws of the defendant. Section twenty of the by-laws provides that in case a member of the association shall sustain any bodily injury, induced by external, violent and accidental means, sufficient to entitle him to any benefits, "a written notice must be given by the member to the secretary of the association, at Des Moines, Iowa, within ten days after the time when the injury was received, which notice must contain full particulars of the injury, the time, place and circumstances under which it occurred, and the full name, address and occupation of the member. Such notice must be signed by the member. No benefits can accrue or be paid because of any accident or injury unless the notice of injury

above specified has been given within the time,
2 and by the person, above specified." The

defendant contends that the notice required by that section was not given until the eighth day of November, 1893, or more than ten days after the injury in question was received; and that it appears that the formal notice, on a blank furnished by the defendant, was not filled out and returned to the latter until the date last specified. The defendant had the right to insist upon the notice required by its by-laws. *Simons v. Association*, 102 Iowa, 267. On the second day of November, 1893, the defendant wrote to the plaintiff, stating, "We are in receipt of your favor, dated the 31st ult., stating that you have met with an accident." This statement contains the only evidence of the contents of the letter of the plaintiff, to which it was an answer, which has been called to our attention. It does not show that the letter contained the information required by the by-laws. It is said by the plaintiff that the sufficiency of the notice was not questioned by the pleadings. The burden was on the

plaintiff, in order to recover, to show the facts which constitute a complete cause of action. To show an accident and resulting injuries was not sufficient. The contract between the parties provided that "no benefits can accrue or be paid" until the required notice should be given. But section 2715 of the Code of 1873, which was in force when this action was tried in the district court, provided that, "in pleading the performance of conditions precedent in a contract, it is not necessary to state the facts constituting such performance, but the party may state, generally, that he duly performed all the conditions on his part." Section 2717 provides that, "if either of the allegations contemplated in the three preceding sections is controverted, it shall not be sufficient to do so in terms contradictory of the allegation, but the facts relied on shall be specifically stated." The plaintiff alleged in his petition that he had "complied with all the conditions and provisions of the articles of incorporation and by-laws of said association on his part to be kept and performed, and that by the terms of said certificate he is entitled to the sum of two thousand five hundred dollars for the loss of his said foot, and the further sum of one thousand two hundred and twenty-five dollars, being the sum of twenty-five dollars per week for a period of forty-nine weeks, during which time he has been continuously disabled." The certificate provides that the member is entitled to the benefits appertaining to the class to which he belongs, subject to the conditions and provisions of the articles of incorporation and by-laws. The averment of the petition which we have set out was a general statement to the effect that the plaintiff had performed all the conditions of the contract on his part, and was sufficient, under section 2715. The answer of the defendant contained a general denial, but the facts relied upon to show that due notice had

not been given were not stated, and therefore the sufficiency of the notice was not in issue. See *Brock v. Insurance Co.*, 96 Iowa, 39; *Clark v. Riddle* 101 Iowa 270.

III. The certificate states that the occupation of the plaintiff was that of a coal merchant, and that he was a member of class one of the association. By the terms of the certificate, members of that class might become entitled to weekly benefits of twenty-five dollars, and to two thousand five hundred dollars for the loss of a foot. The evidence shows, and the

3 plaintiff admits, that when he applied for the certificate, and when it was issued to him, he was conductor of a railway train. Members of that occupation belong to class five of the association, and could not become entitled to weekly benefits of more than ten dollars, nor to more than six hundred and twenty-five dollars for the loss of a foot. The plaintiff claims that, when he made his application for the certificate in suit, he informed the defendant that he was a railway conductor, but that he intended to leave the service of the railway company about the first day of the next September, to commence dealing in coal, and that he wished the certificate dated September 1; that he intended to change his occupation as stated, but was unexpectedly obliged to continue in the service of the company until about October 1st, at which time he stopped working for it, and took a leave of absence for forty-five days, but with the intention of not resuming that work. He was not employed as a conductor when the accident in question occurred. It is only necessary to say with respect to this branch of the case that, if the claims of the plaintiff which we have referred to are well founded, the fact that the plaintiff was not a coal merchant when the certificate was issued did not render it void. If it was issued with knowledge on the part of the defendant of the fact that the plaintiff was then a railway conductor, but with the

understanding that he was to change his occupation to that of a coal merchant, it would take effect according to its terms, and was valid.

IV. It is insisted that the liability of the defendant, if there be any, is to make and pay over the proceeds of an assessment, or so much thereof as is necessary to pay the amount to which the plaintiff shows himself to be entitled. One of the conditions upon

which the certificate was issued is stated as follows: "This association does not agree to pay to any certificate holder or beneficiary, in any case, either by way of indemnity or benefit, a greater sum than is realized by said association from one quarterly payment of two dollars made and collected from those who were members at the date of the accident." A similar limitation is contained in article 9 of the articles of incorporation of the defendant. Article 8 of those articles provides for the payment by each member of the association of quarterly dues of one dollar, and of assessments for the payment of benefits to be made in sums of two dollars each. It also provides that: "Satisfactory proof of death or injury by accident to any member of the association in good standing having been received by the secretary, should there not be a sufficient amount of funds in the treasury, or provision made therefor, to pay the claim, an assessment of two dollars shall be made on each member. Should the amount received from such assessment be greater than that required to pay all adjusted claims, the surplus shall be held and used in payment of future claims." It is also provided that, if the quarterly dues shall produce more revenue than is required to properly conduct the business of the association, the excess shall be applied to the payment of claims. It thus appears that a claim is not necessarily to be paid from the proceeds of an assessment made for that especial purpose. The certificate provides for the payment of

fixed sums, not to exceed in amount the sum which would be realized from one quarterly assessment of two dollars collected from those who were members of the association at the date of the accident. But, although that fixes the maximum amount of recovery on a claim, it does not, under the various provisions we have considered, fix the source from which a claim shall be paid. The contract differs in that respect from those considered in *Rainsbarger v. Association*, 72 Iowa, 191, and *Bailey v. Association*, 71 Iowa, 689. The cases of *Neskern v. Association*, 30 Minn. 406, (15 N. W. Rep., 683), *Metropolitan Safety Fund Accident Association v. Windover*, 137 Ill. Sup. 415, (27 N. E. Rep., 538), and *Society v. McKay*, 140 (Ind. Sup.) 415, (40 N. E. Rep., 910), are more nearly in point. We are of the opinion that the certificate in suit is a contract for the payment of fixed sums of money upon the happening of special contingencies, but subject to the limitation that the liability of the defendant shall not exceed the sum which could be realized from one quarterly payment made by persons who were members of the association at the time of the accident; that it must be presumed, in the absence of a showing to the contrary, that the sum which would be realized from such payment would be sufficient to pay the sums for which the certificate provides; and that, if it would not be sufficient, it is necessary for the defendant, in order to reduce the amount of the plaintiff's recovery, to plead and show the fact. It is not necessary, in the first instance, to compel the defendant to make an assessment, even though it show that it has not in its possession funds with which to pay the amount due; but an action at law may be maintained to obtain judgment for the amount shown to be due, and a recovery for that amount be had, unless it be reduced by a showing on the part of the defendant that it would exceed the amount which an

assessment of two dollars made upon persons who were its members at the time of the accident would produce. The defendant did not plead or prove any fact which would have reduced the amount for the payment of which the certificate, on its face, provides.

V. The defendant complains of rulings on the admission of evidence. The plaintiff was permitted to testify that he had read every word in the certificate and the articles of incorporation and by-laws of the defendant, and that he had complied with all of them. We think this testimony was erroneously admitted, as stating the conclusion or opinion of the witness; but as it tended to prove what was alleged in the petition, and was not sufficiently denied in the answer, the admission was without prejudice. We think that objections made by the defendant to other evidence which was introduced were well founded, but it related to unimportant or undisputed matters, and prejudice could not have resulted from it.

VI. The appellant contends that, if the plaintiff is entitled to recover for the loss of his foot, he is not also entitled to recover for weekly benefits. The certificate provides, in terms, for the payment of weekly benefits and for the loss of a foot in certain contingencies. We do not find anything in the certificate, or in the articles of incorporation or by-laws, which justifies the conclusion that a member might not recover for the loss of a foot and for the loss of time caused by the same injury. The disability for which weekly benefits are allowed is that which disables a member, and prevents him "from attending to any and every part of his business." The limitation on the amount of recovery, aside from that which results from the insufficiency of an assessment to yield the sum fixed by the certificate, is stated in a by-law as follows: "Provided, however, that the total amount

to be paid by the association in any one year, or for any one accidental injury, shall not exceed the mortuary benefit of the class to which the member belongs, or in which he should be classed, because of his occupation, act, or employment, when injured." The mortuary benefit which accrues on account of the death of a member of the first class is five thousand dollars; and on account of the death of a member of the fifth class, one thousand two hundred and fifty dollars. Although the limitation quoted is not invoked in this case, it tends to refute the claim of the appellant that a recovery cannot be had for the loss of a foot, and also for the disability which resulted from it.

VII. The charge of the court authorized the jury, upon the finding of certain facts, to allow the plaintiff two thousand five hundred dollars for the loss of his foot, and twenty-five dollars per week for each week he was wholly and continuously disabled, not to exceed a total of fifty-two weeks; but the jury was not directed to allow anything for interest. The verdict returned was for the sum of four thousand three hundred and forty-nine dollars and forty-seven cents. The
7 evidence shows, without conflict that the plaintiff was continuously disabled for more than fifty-two weeks. Therefore it is evident that the verdict included two thousand five hundred dollars for the loss of the foot, and one thousand three hundred dollars for continuous disability, and that the remainder of the verdict, or five hundred and forty-nine dollars and forty-seven cents, was for interest, and under the charge of the court, unauthorized. Attention was called to this error by the motion for a new trial, but it was not corrected, and judgment was rendered on the verdict. In that the court erred. It should have granted a new trial unless the plaintiff had consented to remit the sum stated. We conclude that for its failure to do so its judgment must be reversed, unless

the plaintiff shall, within thirty days from the filing of this opinion, file in this court an election to remit the sum of five hundred and forty-nine dollars and forty-seven cents, with interest thereon at six per cent per annum from the twenty-sixth day of October, 1896. If such an election is filed within the time stated, the judgment of the district court will be modified and affirmed; but, if it be not so filed, the judgment will stand reversed.

VIII. The appellant complains of various portions of the charge given, and of the refusal of the court to give certain instructions asked, and of other rulings; but we do not find prejudicial error in any of the rulings thus questioned. The controlling questions are disposed of by what we have said.—REVERSED.

ROBERT P. FOSS V. ALMIRA COBLER AND GEORGE PAUP,
Administrator, Appellants.

Attorneys: LIEN. An attorney's lien upon moneys and papers for his services is purely possessory, and cannot be actively enforced,
3 but is a mere right to retain the papers until settlement and payment of what is justly due him.

EMPLOYMENT BY HEIR: Parties. An attorney employed by the sole heir of an intestate to protect her interest in the estate has no lien
3 by virtue of Code, section 321, for services rendered to her, upon funds in his hands belonging to the estate, as the administrator and not the heir has the right to the possession of the fund, and because a lien may be had upon funds of the estate for services rendered
4 the administrator. And, hence, the administrator is not a proper party to a suit against the heir for services in protecting her interests in the estate, in which a lien is sought on such fund.

Equitable Assignment. An equitable assignment *in toto* or *pro tanto* of a fund in the hands of an attorney, belonging to the estate is not effected by a letter from the sole heir directing him
1 to protect her interest in the estate and pay himself out of the money in his hands. It amounts to no more than an agreement that the attorney shall be paid out of the funds in his hands.

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Change of Place of Trial: WAIVER Defendant does not waive the overruling of a motion to change the venue to the county of her residence by answering the petition.

Appeal from Shelby District Court.—HON. W. I. SMITH,
Judge.

TUESDAY, MAY 24, 1898.

JASPER ROBERTSON left in the keeping of plaintiff certain notes and accounts. He was murdered in 1889, and George Paup appointed administrator of his estate. The defendant Almira Cobler is his mother and sole heir. In 1890 she employed the plaintiff to resist an application for the appointment of one Laraway as administrator, and to protect her interests in general. The plaintiff asks to be allowed five hundred dollars for his services, and that this be established as a lien against the property in his hands at the time of his employment. Decree was entered substantially as prayed, and the defendants appeal.—*Reversed*.

Thos. H. Smith and Wm. McNett for appellants.

D. O. Stuart for appellee.

LADD, J.—Before Jasper Robertson left Harlan, in 1889, he deposited with the plaintiff for safe-keeping certain notes, amounting in value to six hundred and eighty-six dollars, and never returned. Subsequently, in 1891, his body was found, and J. K. Cumberland convicted of having murdered him. See *State v. Cumberland*, 90 Iowa, 525. After some correspondence, Mrs. Cobbler, the mother and sole heir of Jasper, wrote the plaintiff a letter, the material part of
1 which is as follows: "Now, Mr. Foss, I want you to take the case in your own hands, and do the best you can for me, and pay yourself out of the money you have in your own hands. If the money

you have got in yours can't be used to pay expenses, the case will have to be dropped; but I want you to do the best you can for me, and, if anyone undertakes to take the advantage of us, I want you to prevent them from so doing, if you possibly can, for there is not any one that has a just right to anything you have got in your hands, except myself and my half-brother, John Robertson, in Wyoming. Please do write to me, and give me all the information you can concerning our business at Harlan, for I feel very anxious and distressed over the matter." On the strength of this letter, the plaintiff successfully resisted the application to have one Laraway appointed administrator of Jasper's estate, and, as incident to his employment found it necessary to pursue and bring his slayer to justice. For the services so rendered, he asks that a lien be established on the fund in the hands of the administrator derived from the notes referred to, and that the administrator be directed to pay him therefrom.

With this preliminary statement, we may now consider the motion filed by each party to strike from the petition the averments relating to the administrator. It is quite evident that, unless the plaintiff acquired some lien on the funds in his hands, these motions should have been sustained; for, without the lien, his action is purely personal against Mrs. Cobler,

with which neither the administrator nor
2 the estate is concerned. If he acquired a
lien, however, the administrator is a necessary party, as he has the property sought to be charged, and to him, rather than to Mrs. Cobler, the orders of the court must be directed. If a lien exists, it must be by virtue of an equitable assignment or of the general employment as attorney. The doctrine of an equitable assignment is thus stated by Mr. Pomeroy: "In order that the doctrine may apply, and that there

may be an equitable assignment creating an equitable property, there must be a specified fund, sum of money, or debt actually existing, or to become so *in futuro*, upon which the assignment may operate; and the agreement, direction for payment, or order, must be, in effect, an assignment of that fund, or some definite portion of it. The sure criterion is whether the order or direction to the drawee, if assented to by him, would create an absolute personal indebtedness, payable by him at all events, or whether it creates an obligation only to make payment out of the particular designated fund. The agreement, direction or order being treated in equity as an assignment, it is not necessary that the entire fund or debt should be assigned. The same doctrine applies to an equitable assignment of any definite part of a particular fund." 3 Pomeroy Equity Jurisprudence, section 1280. To the same effect, but more explicit as applied to the case before us, is this language from *Christmas v. Gaines*, 14 Wall., 69: "An agreement to pay out of a particular fund, however clear its terms, is not an equitable assignment. A covenant in the most solemn form has no greater effect. The phraseology employed is not material, provided the intent to transfer is manifest. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund,—any authority to collect or any power of revocation. If he does, it is fatal to the claims of the assignee. The transfer must be of such a character that the fundholder can safely pay, and is compellable to do so, though forbidden by the assignor." See, also, *Harris County v. Campbell*, 68 Tex. Sup. 22, 2 Am. St. Rep., 467, and extended note (s. c. 3 S. W. Rep., 243); *Field v. Mayor*, etc., 57 Am. Dec. 434, and note; *Stott v. Franey*, 20 Or. 410, 26 Pac. Rep., 271; *McWilliams v. Webb*, 32 Iowa, 577. The letter in this case does not constitute an assignment or transfer of

any sum *pro tanto*, but amounts to an agreement only that Foss shall be paid out of moneys on hand. With the most favorable construction possible, it does not come within the recognized definitions of an equitable assignment. See, *Trist v. Child*, 21 Wall. 441.

II. Did the plaintiff acquire a lien by virtue of his general employment and the services rendered thereunder as an attorney? The lien to which an attorney is entitled is fixed by section 321 of the Code. This is a substantial enactment of the common law with the requirement concerning notice added. *Jennings v. Bacon*, 84 Iowa, 403. The lien attaches to any papers and money belonging to the client which have come into his hands in the course of his professional employment. Whether an arrangement to compensate an attorney out of the judgment obtained operates as an equitable assignment to the extent of the amount due him is not pertinent to this inquiry. But see *Ward v. Sherbondy*, 96 Iowa, 477; *Andrews v. Morse*, 31 Am. Dec. 752; *Weeks v. Wayne Circuit Judges*, 73 Mich. 256; (41 N. W. Rep. 269). The obstacles to the lien in this case seem insurmountable. While the title to the papers of Jasper vested in Mrs. Cobler upon his death, *Christie v. Railroad Co.*, 104 Iowa, 707, it was subject to administration, and only through distribution or the expiration of the statute of limitations could her interest therein be definitely ascertained. *Phinny v. Warren*, 52 Iowa, 332. She could not maintain an action for or on the notes, nor could she make any binding contract concerning the amount to be collected thereon. The legal representative has the right of possession of all personal property owned by the deceased, and this cannot be limited by contracts of or liens created by the heirs, nor can he be required by the heirs to satisfy the debts of the decedent out of one portion of the personal estate rather than another. As the heir has neither the right of possession of the

papers and money of the deceased, nor an ascertained and certain interest therein, he cannot confer upon an attorney, by employment, a lien which is possessory in character. The fact that a lien may exist on property of an estate in pursuance of services rendered an administrator seems conclusive on this proposition. While the interest of such an officer is that of trustee, it is coupled with the right of possession.

4 Besides, if the lien existed, it was purely possessory, and cannot be actively enforced. It was a mere right to retain the papers until settlement and payment of what was justly due the attorney. *Stewart v. Flowers*, 7 Am. Rep. 707; *Nichols v. Pool*, 89 Ill. 491; *Dubois' Appeal*, 38 Pa. St. 231, 80 Am. Dec. 478 and note; *McDonald v. Railroad Co.*, 93 Tenn. 281, (24 S. W. Rep. 252); 3 Am. & Eng. Enc. Law, 459, 464. If the client is not content with the charge, the statute affords him suitable relief, and any dispute may be adjusted in a suit on the bond executed. Code, Section 322.

III. It follows from what has been said that the plaintiff had no cause of action against the administrator, and that the motion to strike the averments relating to him ought to have been sustained.

5 Mrs. Cobler filed a motion for change of venue, supported by an affidavit to the effect that she was a resident of Wapello county when this action was begun, and had been since. This motion should have been sustained. The contention of the appellee that, by answering, she waived any error in overruling her motion, is without merit. *Kelley v. Cosgrove*, 83 Iowa, 229. There was no waiver. *Kell v. Lund*, 99 Iowa, 153; *Allerton v. Eldridge*, 56 Iowa, 709; *McCracken v. Webb*, 36 Iowa, 551; *Jones v. Railway Co.*, 36 Iowa, 68 *Horak v. Horak*, 68 Iowa, 49.—REVERSED.

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W. S. RICHARDS, ETC., Appellant, v. C. W. COWLES, now Deceased, GEO. L. MOORE, Executor of the Last Will and Testament of C. W. COWLES, Deceased, Appellees. R. S. FINDLEY, Receiver of the Osceola Bank Appellees, v. LUCAS LAND & LIVE STOCK COMPANY, GEORGE H. COWLES, H. E. MOORE, GEORGE L. MOORE, Executor of the Estate of C. W. COWLES, Defendants, W. S. RICHARDS, Executor, Intervener and Appellant, and W. S. RICHARDS, Executor, etc., Appellant, v. R. S. FINDLEY, Receiver of the Osceola Bank, and Individually at Suit of W. S. RICHARDS, Executor, etc., Appellant, v. GEORGE L. MOORE, Executor of the Estate of C. W. COWLES, Deceased, Appellee.

Subrogation: PRIORITY OF CREDITORS: Garnishment A bank having county funds on deposit, secured by an indemnity bond, gave the county additional security in the form of bills and notes. The bank failing, the county collected its claim from the surety by sale of his real estate on execution. No supersedeas was given and the land went to deed. The court below ordered also, that said collaterals be turned over to the receiver of the bank. (On appeal there was a reversal, and it was ordered that the notes

- 1 should first be applied to pay the judgment, and that the proceeds of the real estate belonging to the bank should be used to reimburse the surety on the indemnity bond whose land had so been sold. A creditor of the surety subsequently levied on the same
- 3 real estate, and sold it under execution. The receiver of the bank garnished the proceeds of the bills and notes in his own hands in a suit against the surety who had a claim upon the
- 4 receiver for the proceeds of the land, but against which the receiver had a set-off. *Held*, that such creditor was not entitled to be subrogated to the county's lien on the collateral security, and that the receiver's garnishment, being first in time, gave him the first right thereto.

Marshalling Assets. A creditor who has a lien upon two funds may

- 2 be compelled by a creditor having a subsequent lien upon one
- 3 alone of such funds to resort in the first instance to that fund which is covered by his lien alone.

SAME. The equity of marshalling assets does not fasten itself upon the situation at the time the successive securities are taken
2 but is to be determined as of the time the marshalling is invoked.
3 It can only become a fixed right by taking proper steps to have
4 it enforced, and until this is done it is subject to displacement and defeat by subsequently acquired liens upon the funds.

INTERVENTION. Where a creditor intervenes in an action by another creditor who, by a prior garnishment, had acquired a higher and
4 better right to the fund than he had, it does not present a case for the application of the equitable doctrine of marshalling assets.

MAXIMS. Where the equities are equal, the law will prevail.

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Appeal from Clarke District Court.—HON. H. M. TOWNER,
Judge.

• TUESDAY, MAY 24, 1898.

THE three cases entitled as above were by agreement tried as one in the lower court, and are so submitted here. They involve the right to certain funds now in the hands of R. S. Findley, receiver of the Osceola Bank, the proceeds of certain notes, which at one time were turned over to the treasurer of Clarke county by the officers of the Osceola Bank to indemnify the county for any loss which it might sustain by reason of having deposited its funds in said bank. The appellant, W. S. Richards, executor, who has been substituted in this court as a party for Seth Richards, now deceased, claims that he is entitled to the fund by reason of being equitably subrogated to the rights, remedies, and equities of W. S. Richards, treasurer, in and against said fund. The receiver claims the fund as an asset of the Osceola Bank, and denies the right of Richards, executor, to be substituted to any rights of Richards, treasurer. The executor of the Cowles estate denies the claims of both parties. The

case was tried to the court, resulting in a decree dismissing the petition of Richards, executor, and confirming the said fund in the receiver. W. S. Richards, executor, appeals.—*Affirmed*.

McNett & Tisdale, for appellant.

M. L. Temple, for appellee receiver.

J. W. Lewis, for appellee Geo. L. Moore.

DEEMER, C. J.—The facts in the case are so complicated that we find it difficult to make a succinct statement. Only those questions which arise in the case of Findley, receiver, against the live-stock company, *et al.*, defendants, and Richards, executor, appellant, are argued by appellant, and the other cases will be referred to only in so far as they are material to the issues presented.

1. For many years prior to the institution of this litigation, the Osceola Bank was a corporation doing a banking business in Clarke county, Iowa. George H. Cowles was vice president and manager, and C. W. Cowles, until shortly before the failure of the bank was one of its largest stockholders. On the twenty-second day of November, 1888, the bank failed and was placed in the hands of a receiver. Prior to that time it had been a depository of county funds, and George H. and C. W. Cowles were sureties on the bond given by the bank to the county. A few days before the failure, G. H. Cowles deposited with the treasurer of the county about ten thousand dollars in bills receivable, as additional security to the county. In January of the year 1889 the county treasurer brought suit on the bond given by the bank to recover the funds on deposit at the time of the failure of the bank. At the trial in the district court it was adjudged that the county had no right to the collateral notes which

had been turned over to the treasurer, and the treasurer was ordered to turn the notes over to the clerk of the court, who in turn was ordered to deliver the same over to the receiver of the bank. Judgment was rendered upon the bond against the bank and the sureties on that obligation, and certain real estate belonging to C. W. Cowles was levied upon under execution issued on this judgment, and sold on May 18 and 21 and June 22, 1889. The case was appealed to this court, and the judgment of the court below, finding that the bank had no right to pledge its bills receivable to the county treasurer, was reversed. See 79 Iowa, 707. It was held in that case that the notes so deposited should first be applied upon the judgment, and that the proceeds of the real estate belonging to the bank should not be so applied as to defeat the application of the proceeds ratably among the creditors, and that a final decree should be rendered in harmony with the opinion. As no supersedeas was filed, the real estate which had theretofore been sold at execution sale went to deed. It was further provided in the final decree, that, if the judgment had already been paid by either of the sureties on the bond, the proceed of the note should be applied to reimburse them or either of them. At the time this decree was entered, the notes, or the proceeds thereof, were in the hands of the receiver under the order of the district court, for it seems he had intervened in the suit claiming this property as assets of the bank. On the ninth day of January 1890, Seth Richards, a creditor of George H. Cowles, brought suit against him to recover the amount of his claim, sued out an attachment, and caused it to be levied upon the same real estate which had therefore been sold under the judgment obtained by the county treasurer. On May 15, 1890, he obtained judgment and an order for the sale of the attached property, and on May 20, 1890, he began another suit, aided by attachment, levied

upon the same lands, and garnished the receiver and the clerk of the court as supposed debtors of Cowles. On October 2, 1893, this cause was dismissed for want of prosecution, and no move was made to reinstate it until February 18, 1895. As no claim is made under this levy and garnishment, it need not be further considered. On November 20, 1889, Findley, receiver, brought suit against the Lucas Live-Stock Company, George H. Cowles and C. W. Cowles, and recovered judgment against them for more than thirteen thousand dollars. This judgment was afterwards affirmed by this court. See 93 Iowa, 789. Thereafter, and on May 19, 1890, the receiver caused a writ of attachment to issue in said suit, which was levied upon the real estate theretofore sold under the judgment obtained by the county treasurer, and attached by Richards, and he also caused himself to be garnished. The suit first named in the caption is the one brought by Seth Richards May 20, 1890; the second is the one brought by the receiver November 20, 1889, in which Seth Richards, on or about February 1895, and after the writ of attachment was sued out, intervened, claiming that he had a lien upon the funds arising from the collateral notes prior and superior to any right or lien of the receiver; and the third is the one docketed in the garnishment proceedings sued out in the case first named. The real question in the case is, which party has the better right to the funds arising out of these collateral notes, the receiver or the intervener Richards, executor?

The contention of appellant is, to quote the language of his counsel: "First, that in equity said W. S. Richards, treasurer, should have first resorted to said notes which had been placed in his hands to
2 indemnify him, and the moneys collected thereon, for the satisfaction of his judgment, so as to have left the real estate to be subjected under the

attachment of Seth Richards to the unpaid portion of his judgment; and, second, that, as said W. S. Richards, treasurer, did not do this, but exhausted the real estate upon which both he and Seth Richards had liens, the said appellant under equitable principles, is entitled to be subrogated to the lien which said W. S. Richards, treasurer had on said notes so deposited with him, and the amount so collected thereon, to the extent that he had been deprived of his lien on said real estate." Subrogation is well understood to be "the substitution of another person in the place of the creditor to whose rights he succeeds in relation to the debt." It is an equitable result purely, and depends upon facts to develop its necessity that justice may be done. We do not see any room for application of this doctrine to the case at bar. Here is a contest where two creditors are each seeking to sequester a certain fund which is in the hands of an officer of court under an order placing it in his hands. What right has Seth Richards, through his executor, to this fund, which is higher than that of the receiver, who also holds a claim against the same debtor? If Richards, as treasurer, ever had a lien upon the fund superior to that of the receiver, and to which the appellant might, in proper case, be substituted, this right was disposed of by decree of this court in a case where all persons interested were made parties, which discharged the lien of the county treasurer, and decreed that the receiver should pay the amount of the fund to C. W. Cowles, whose land had been taken to pay the judgment. There was nothing more than a judgment obligation to pay this sum to Cowles, and no one had a lien upon it after this order was made, unless it be Cowles. But, as he is not attempting to enforce such a claim, the case is as if the receiver owed Cowles that amount of money. So treated, the receiver had the right to set off as against it the

amount of the indebtedness owed by Cowles. But, whether he had this right or not, Richards has no claim to the fund in virtue of his attachment of the real estate. Surely no authorities are needed to establish these propositions. It may be that in an action between Richards, treasurer, and Seth Richards, as creditor of Cowles, Richards, the creditor, would be entitled to the fund by reason of the right of subrogation, or, more properly speaking, under the doctrine of marshaling assets. But this, as we have seen,

3 is a contest between two creditors to a fund upon which neither has a lien, and we know of no principle of which Richards, the creditor, may avail himself to work out a priority through Richards as treasurer. Referring to the doctrine of marshaling assets, it is well understood that where one creditor has a lien upon two funds, and a second creditor has a lien on only one of said two funds, the first creditor will, in a proper case, be compelled to first resort to that fund on which the second creditor has no lien. *Massie v. Wilson*, 16 Iowa, 392; *Miller v. Clarke*, 37 Iowa, 325. The difficulty in applying the rule to this case lies in the fact that Findley, the receiver, the plaintiff in the case which is now being considered, has no lien upon two funds. He has no lien upon any fund, unless it be from the fact that he holds the proceeds of the collateral notes in his possession. He never had any claim upon the lands. Moreover, he does not stand in the shoes of the county treasurer. He holds the funds because turned over to him under order of court, and his right is official and personal, and not derivative. He holds, as we have already said, as a debtor of Cowles, and at the same time has a judgment in his favor as receiver for more than the amount of Cowles' claim. It is probable that Cowles, having paid the judgment in favor of the county through the sale of his real

estate, was subrogated to the rights of the county treasurer in these collateral notes, but that fact would not give Seth Richards, or his executor, any special claim upon or to the fund. As between the parties to this litigation, neither had a lien upon the fund, and their equities, if there be any, are equal. The

4 receiver's garnishment is first in point of time, however. "Where the equities are equal, the law will prevail," is an old maxim, which may well be applied to this case. Again, this equity of marshaling assets is not one which fastens itself upon the situation at the time the successive securities are taken, but, on the contrary, is one to be determined at the time the marshaling is invoked. It can only become a fixed right by taking proper steps to have it enforced, and until this is done it is subject to displacement and defeat by subsequently acquired liens upon the funds. This inchoate right or equity is not a lien, and is, therefore subject to defeat at any time before it is attempted to be enforced. Consequently it has often been said that marshaling will not be permitted to the prejudice of third persons. Had Seth Richards intervened in the action brought by the county treasurer, and insisted upon the marshaling of the assets, it may be that his prayer should have been granted. This he did not do. His intervention is in a case brought by another creditor of Cowles, who, by a prior garnishment, acquired a higher and better right to the fund than he has; and the facts do not present a case for the application of the equitable doctrine of marshaling. As sustaining our conclusions, see *Green v. Ramage*, 18 Ohio, 428; *Leib v. Stribling*, 51 Md. 285; *Gilliam v. McCormack*, 1 Pickle, 597 (Tenn. Sup.) 4 S. W. Rep., 521. The trial court correctly dismissed the petition of intervention and discharged the garnishee, Findley, at the suit of Richards against the executor of Cowles, deceased.

AFFIRMED.

M. R. KEYS, Appellee, v. WHITLOCK MANUFACTURING COMPANY, F. M. HUBBELL, DES MOINES MANUFACTURING AND SUPPLY COMPANY, A. L. WEST, S. H. WORCESTER, E. VAN DYKE, and WILLIAM AULMAN, Appellees, and CHICAGO LUMBER & COAL COMPANY, Appellant.

Liens: LANDLORD AND TENANT: Estoppel. A lessor's lien for advances made to the lessee for the construction of a building upon the leased premises under an agreement to make an advance upon duplicate bills presented to the lessor for which he was to have a lien upon the building and the machinery placed therein which were to become his property upon the expiration of the lease, is paramount to a mechanic's lien for material furnished in the construction of the building, where a portion of the advance was made in reliance upon a receipt from the material man showing full payment of his bill, although by a secret arrangement between the latter and the lessee a portion of the bill remained unpaid; and the material man is estopped against lessor to show that his bill was, in fact, unpaid in part though all the material went into lessor's building.

Contract Liens: LANDLORD AND TENANT. H. was to have a landlord's lien to secure advances made to erect a building on his land, which were to be repaid in monthly installments, and on failure to make such payments, the whole amount was to become due, or H. could declare the contract forfeited, and retake the premises. *Held*, that H. had a contract lien upon the premises to the amount of the unpaid advances.

Appeal from Polk District Court.—HON. C. P. HOLMES, Judge.

WEDNESDAY, MAY 25, 1898.

In an action brought by plaintiff, a stockholder in the Whitlock manufacturing Company, to secure the appointment of a receiver, various parties who claimed to hold liens against the property of the corporation intervened, asking the establishment of their

liens and an order fixing their priorities. Of these interveners was F. M. Hubbell, who claimed a contract lien for money advanced the corporation, and the Chicago Lumber Company, which claimed a mechanic's lien upon the property of the corporation. An issue between these two interveners was tendered, and the case was tried to the court, resulting in a decree establishing the lien of each, but declaring that that of the Chicago Lumber Company was junior and inferior to that of Hubbell. The lumber company appeals.—*Affirmed*.

Berryhill & Henry for appellant.

St. John & Stevenson and *Cummins, Hewitt & Wright*, for appellee Hubbell.

DEEMER, C. J.—Prior to the time of the execution of the contract hereinafter referred to, the Whitlock Manufacturing Company was a corporation doing business in East Des Moines. Desiring to move its plant to West Des Moines, it entered into a contract with F. M. Hubbell, by the terms of which it leased certain lands of him for the term of eighteen years, agreeing to erect a building thereon, and to
1 move its machinery into the new building. Hubbell agreed to advance five thousand dollars to enable it to build and equip the building, to be paid as the work progressed upon duplicate bills presented to him. Hubbell was to have a lien upon all the machinery and fixtures from the date of the contract for all advancements made by him, and as security for the faithful performance of the contract; and it was further provided that, after the machinery was placed in the new building, the lien should be that of a landlord. The corporation was to keep the property insured for the benefit of Hubbell. The contract also

provided that the corporation should make certain monthly payments, called "rental," until the full amount of the five thousand dollar advancement should be repaid. After that the rent was to be one dollar per year for a certain period; and at the expiration of that time, it was to be an amount equal to five per cent of the valuation of the property. The contract further provided that in case of failure on the part of the corporation to comply with the terms of the contract on its part for the period of ninety days, the whole amount of the rent should become due, or, at the election of Hubbell, he might declare the contract forfeited, and retake possession of the premises. Provision was also made for the payment of costs and attorney's fees incident to suit brought to enforce the provisions of the contract; and it was further stipulated that, at the expiration of the lease, all improvements placed upon the premises should become the property of Hubbell. The corporation undertook the erection of a building upon the premises, and purchased of the Chicago Lumber & Coal Company material to the amount of about one thousand two hundred dollars. During the progress of the work, Hubbell gave the managing officer of the corporation a check for six hundred and thirteen dollars and ninety-six cents, payable to appellant's order, and at another time a check for five hundred and fifty-four dollars, which was represented to be the remainder of the amount due. Before giving this last check, Hubbell insisted upon a receipt in full from the lumber company. Thereupon the lumber company gave a receipt to the Whitlock Manufacturing Company showing the payment of one thousand two hundred dollars. The corporation, however, at the same time, made a written statement to the lumber company, showing that the receipt was for two hundred more than was actually received. When Hubbell

saw the receipt, he gave the second check, acting in the belief that this fully paid the lumber company bill, and had no knowledge to the contrary until about the time of the commencement of this litigation. As a matter of fact, the corporation had a contract with the lumber company, by which it (the company) was to take its bill in work; and, when the first bill was delivered to the lumber company, it gave half, or nearly half, of the amount, back to the corporation. The last check was indorsed by the lumber company and handed back to the corporation, and the lumber company accepted the check of the corporation in lieu thereof for something like three hundred dollars. As the corporation failed to make its payments under the lease Hubbell declared the same forfeited.

Appellant contends that it is entitled to judgment against the corporation for the balance due upon its account, to a decree establishing and foreclosing its mechanic's lien, and to an order declaring that its lien is prior and superior to any claim of appellee Hubbell. That it is entitled to a judgment and lien against the corporation is conceded, but appellee insists that such judgment and lien is junior and inferior to his rights under the contract. For the purpose of the case, it may be conceded that, if the contract were an ordinary agreement of lease, appellant's judgment, at least as to the building, should be decreed to be prior and superior to the lessor's claim for rent. See Acts Sixteenth General Assembly, chapter 100, section 4. But such is not the fact. Hubbell agreed to loan the corporation five thousand dollars for the purpose of furnishing
2 it funds with which to erect a new building.

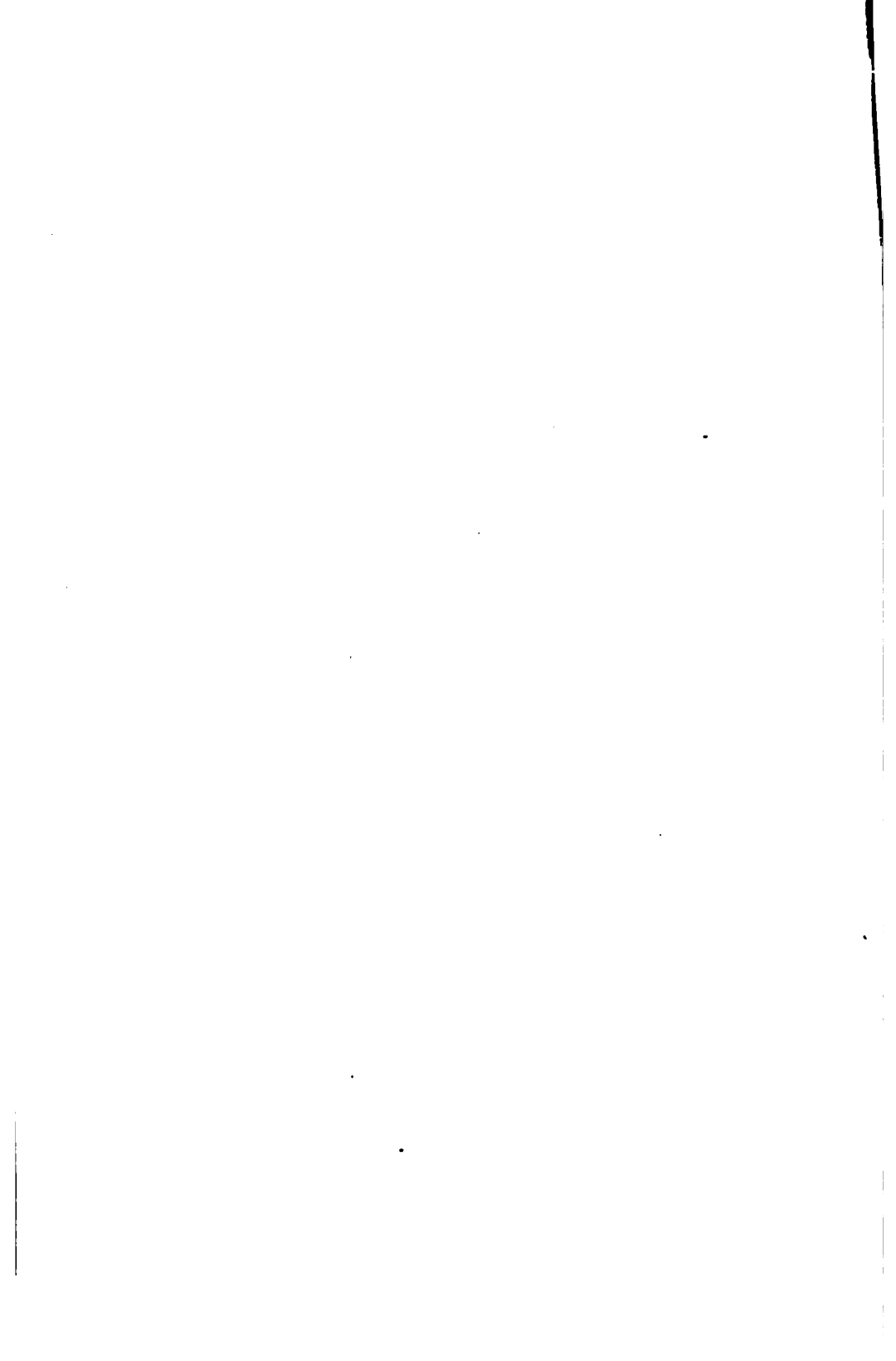
To secure this advance, he was to have what is called a "mortgage lien" upon the machinery and fixtures before their removal to the new building, and, after that time, what was called a "landlord's lien"

upon all the property of the corporation used upon the premises; and, in addition thereto, the property was to become his at the expiration of the lease. Now, while it is true that Hubbell was not entitled to a landlord's lien for money advanced, yet the name by which the lien was created is of no consequence. It is clear that a lien was created by the contract for money advanced, and it is also true that, for failure to pay any of the installments, the whole amount became due and payable, and all rights of the lessee were forfeited. We are of opinion that Hubbell has a contract lien upon the premises and machinery to the amount of the unpaid advancements, and that this lien should be recognized and enforced in equity.

We have already said that the lumber company is also entitled to a lien against the corporation; and the question yet remains, which of these liens is entitled to priority? A reading of the contract clearly demonstrates that Hubbell was to advance the five thousand dollars for the purpose of erecting the building, and that he intended to so advance it as to save the buildings from liens. He agreed to pay, as the work progressed, upon duplicate bills from those who were doing the work or furnishing material, and we are satisfied the lumber company knew of this arrangement. When the first bill was presented, he gave his check for the full amount thereof; and, before paying the last bill, he required a receipt showing full payment. A receipt for one thousand two hundred dollars was given, and it was represented that this extinguished the lumber company's claim. In this belief Hubbell gave the second check. That the bill was not paid in full is due to some secret arrangement between the manufacturing company and the lumber company. Surely, under this state of facts, the lumber company should not be given priority.

Although its bill has not in fact been paid, yet appellant is clearly estopped from claiming that it has not received the amount due.

It is said that Hubbell suffered no prejudice by reason of appellant's conduct, for the reason that all the money paid went into the property. A sufficient answer to this, we think, is, that Hubbell had the right to stand upon his contract, and to make the payments as he saw fit. Appellant will not be permitted to say that the money paid for the purpose of liquidating its contract was diverted from this channel, and paid to some other creditor of the corporation. Hubbell had the absolute right to say who should be paid, and the mere fact that the money was used to pay some one else who might have had a lien upon the building is no answer to the claim of estoppel. Had Hubbell known of the other bills, he might well have refused to pay any of the accounts until he knew whether they would aggregate more than the sum he agreed to advance. The decree of the district court is right and it is **AFFIRMED**.



APPENDIX

Notes of Cases Not Otherwise Reported.

M. H. DILENBECK, Appellant, v. WILHELM AND AGUSTA REHSE.

PRINCIPAL AND AGENT. An agent has no authority to accept an installment of principal on a note more than two years before its maturity and more than one year before the date at which the maker has the option to pay it; and a payment made by the maker to the agent is not binding upon the principal, where the principal had consented to its payment on the condition that he should have notice before it was paid, which condition was not observed.

Apparent authority. An agent authorized to collect interest coupons and installments of the principal, has implied authority to accept payment before maturity, where the principal has been accustomed to forward coupons and insist upon the prompt payment of such coupons, and of the installments of principal, long before their maturity.

Appeal from Ida District Court.—HON. Z. A. CHURCH, Judge.

FRIDAY, JANUARY 28, 1898.

ACTION to foreclose a mortgage to which the defendants interpose the plea of payment. Decree for the defendants, and plaintiff appeals.—*Reversed.*

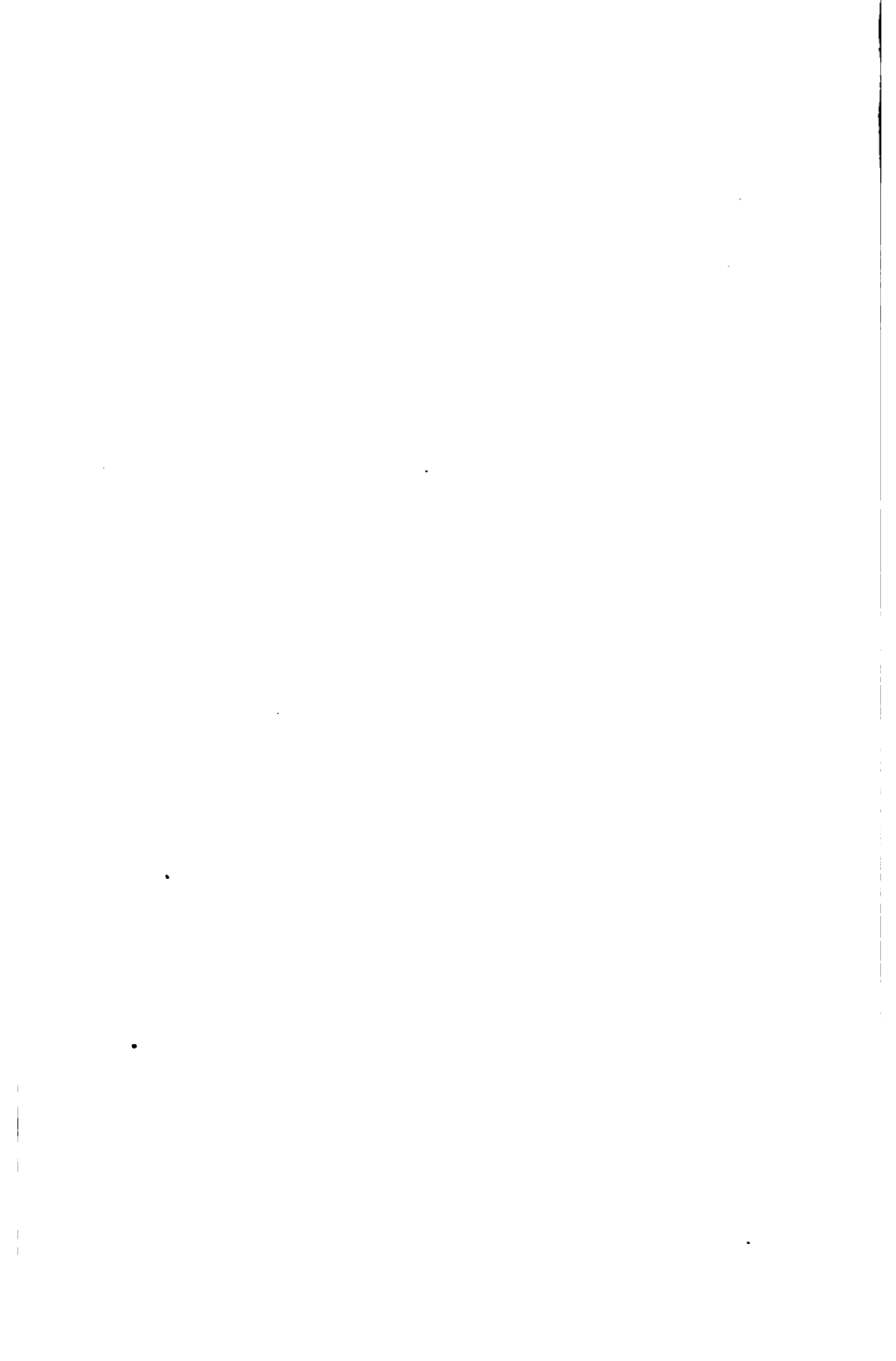
Homer S. Bradshaw for appellant.

Warren & Johnson for appellees.

LADD, J.—The question of fact in this case is whether Cox & Co. was agent for the plaintiff at the time the defendant Rehse paid that firm for him one thousand and thirty-three dollars and seventy-five cents, to be applied in satisfaction of a mortgage executed December 26, 1890, by defendants to the plaintiff, to secure the payment of a bond of two thousand dollars, with ten interest coupons attached, payable semi-annually. It provided for optional payments of one

hundred dollars, or any multiple thereof, on the principal, on January 1st of any year; but, on the sixteenth of the following month, the parties made a separate contract, by which these payments were limited to three hundred dollars or five hundred dollars, of which thirty days' notice was required. The loan was negotiated through J. E. & W. C. Weaver, to whom Rehse paid the amounts due on interest coupons till some time in 1892, and also five hundred dollars on the principal, which was indorsed January 4th. The Weavers were succeeded by Cox & Co., to whom Rehse paid the interest up to December, 1893, when the sole member of that firm absconded. He also paid Cox & Co. five hundred dollars, to be applied on the principal, which was indorsed by the plaintiff in January, 1893. Each of these payments was made about a month before maturity. On November 15, 1893, Rehse also paid Cox & Co., to be sent to the plaintiff, one thousand dollars on the principal and the interest coupon payable January 1, 1894. Did Cox & Co. receive these payments as agent of the plaintiff? Arnett, to whom Dillenbeck transferred the mortgage as soon as he learned Cox had gone, began foreclosure proceedings, which he afterwards dismissed, though not till plaintiff's deposition had been taken. A part of this deposition was introduced in evidence, showing certain admissions, including his testimony that Weaver Bros. made most of his loans while they were in business, and that he "had an arrangement with them by which they were to collect for me, and remit without charge. After they were succeeded by Cox & Co., I had the same arrangement with them that I had with Weaver Bros." He wrote to Cox & Co. to learn if they proposed "to carry out the contracts of Weaver Brothers as to collecting and remitting loans made by them free of charge." Later he advised the firm, in explanation of having sent some coupons to his brother, that "I prefer you to feel responsible and look after the loans made by you; hence I shall do different, and send direct to you." Other letters show that plaintiff sent interest coupons to the firm before maturity for collection, and insisted, before maturity, on prompt remittance of payments on principal if made by Rehse. He asked Cox & Co. to have Rehse notify him of any intended payment as long beforehand as possible, and in December, 1892, wrote: "If he wishes to pay \$500 on the principal in addition to his coupon, then let the remittance be made promptly." In his deposition he admits he knew of Rehse's desire to pay in full five or six weeks before he received the letter from Cox & Co., of November 21, 1893, asking if he would accept payment, and to which he answered the next day: "If I may have the assurance soon that he will pay the loan in full, then I will take it on January 1, 1894." The plaintiff claims to have destroyed all letters received by him, and denies he ever authorized either firm to collect for him; but the deposition and the letters referred to and the course of dealing shown seem more trustworthy, and from these no other inference can be drawn than that Cox & Co. were fully authorized to insist on payments and

interest about to mature, and to receive and transmit the same. It would be limiting such authority to too narrow a scope to say that these could not be received till the day due and thereafter. The agent had the right to accept money when those owing it would, under the circumstances disclosed, be likely to pay; and the fact that plaintiff forwarded coupons, and insisted on prompt payment of the principal, through the agent, weeks before maturity, indicates that he intended the agent to receive the money when offered. It follows that the agent had authority to receive payment of the interest coupon and five hundred dollars of the amount paid. But the remaining five hundred dollars was not due till January 1, 1896; nor had Rehse the right to pay it under his contract before January 1, 1895. The plaintiff had not given his consent to its payment when Rehse paid it to Cox & Co., and had no response to his requirement that he have notice if it were to be paid in full. It is said that the contract limiting the amount the mortgagor might pay is without consideration, and for this reason not binding. But neither party made any such claim, and Rehse, in attempting to obtain Dilenbeck's consent, treated it as valid. Cox & Co. were advised by the plaintiff of the terms of the contract, and nothing in the record indicates an intention to authorize that firm to accept more on the principal than therein agreed. Judgment and decree should have been entered for five hundred dollars, with interest from January 1, 1894.—REVERSED.



INDEX

ACCOUNTS

TO

ADVERSE POSSESSION:

ACCOUNTS—See LEVY.

ACCOUNT STATED—See EVIDENCE, ¹.

ACCRETIONS—See WATERS.

ACKNOWLEDGMENT—See SALES, ¹, ².

ACTION IN REM—See MECHANICS' LIENS, ¹.

ADJUDICATION—See JUDGMENTS, ¹².

NOTICE BY PUBLICATION—The effect of a decree foreclosing a mechanic's lien upon a mortgage is not waived by an agreed statement of facts in an action involving the respective priorities of the mechanic's lien and the mortgage, which after reciting the recovery of a decree states that the only question to be decided is as to the priority of the lien.—*Loan Assn. v. McIntosh*, 697.

ADMINISTRATORS—See ATTORNEYS, ²; EQUITY, ²; ESTATES OF DECEDENTS, ¹, ², ³, ⁴; JUDGMENTS, ².

ADULTERY—See COMPOUNDING FELONY, ¹; CONTRACTS, ².

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ADVERSE POSSESSION.

1. No formal claim of ownership to a fence is necessary on the part of one whose possession and ownership up to the fence are unquestioned, in order to make such possession adverse.—*Fulmer v. Beck*, 517.
2. RULE APPLIED—The evidence showed that the strip in controversy was a part of the original government subdivision owned by plaintiff. About the year 1855 one M. purchased the land owned by defendant, and in 1858, after a private survey, built a fence on the line established, which included the strip in controversy, and occupied and claimed to own the land up to the line. About the year 1863 F. purchased the land, and in 1869 planted a hedge fence as near the fence previously erected as it could be built. Defendant purchased the land in 1882, and testified that he occupied and claimed to own the strip in controversy for more than ten years before it was disputed by any one. His occupation was open and notorious, although the

Small figures refer to subdivisions of Index. The others to page of report.

ADVERSE POSSESSION Continued TO AGENCY

deed under which he held described his land as a government subdivision, and he testified he claimed nothing more than what was contained therein. *Held*, that defendant had acquired title to the strip in controversy by adverse possession.—*Idem*.

3. **Cloud on Title**—A purchaser of an interest in land for certain heirs is entitled to a decree quieting her title to such interest, where a purchaser from other heirs is in possession claiming title to all the land.—*Rogers v. Turpin*, 183.
4. **Deeds**—The grantee in a quitclaim deed of land executed by one who had previously conveyed all her interest, obtains no title where the former grantee is in possession.—*Idem*.
5. **Notice**—Inclosing land and leasing it to one who uses it for a pasture, for which purpose alone it was adapted, constitute sufficient possession to put a purchaser of land on inquiry and charge him with notice of the title of the one who inclosed and rented it.—*Idem*.
6. **Payment of Taxes**—No title to the east half of the southwest quarter of a given section of land is acquired by one to whom the east half of the *southeast* quarter of such section has been conveyed, notwithstanding the payment of taxes on the east half of the southwest quarter for more than thirty years, where it does not appear that any mistake was made in the description of the deed.—*Idem*.

AFFIDAVIT—See **EXECUTION SALE**; **PRACTICE SUPREME COURT**, 2; **TAXES**, 14, 15.

AGENCY—See **CORPOR.** 2, 3, 4, 5; **MORTGAGES**, 7; **RAIL**, 1; **SALES**, 3.

1. **Authority**—An agent of sellers of fruit trees employed by them in delivering trees, "making settlements with the purchasers" and taking notes therefor, has authority at the time of taking a note for the purchase price of trees to enter into an agreement with the purchaser that his principal shall plant the trees and care for the same for four years, replacing all that die within that time, although the order for the trees stated that the entire contract was printed therein, and that all trees failing to grow "the first year" were to be replaced free of charge. Such an agreement is merely a completion of the original contract —*Griffith v. Fields & Bryant*, 362.
2. **Estoppel**—A principal is not estopped to deny unauthorized acts of its agent of which it had no knowledge.—*Bank of Montreal v. Ingerson*, 849.

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AGENCY Continued

8. **SAME**—Hogs were sold on execution against a son who lived on his father's farm, which he assisted in managing, and where the property was located. The father owned them, but had authorized the son to execute a chattel mortgage on them, which he did, reciting that he himself was the owner, and the mortgage was recorded. There was no evidence that the execution in the son's name was authorized by the father, who brought replevin against the purchaser. *Held*, no estoppel.—*Harward v. Davenport*, 592.
4. **General Agent: POWERS: Presumptions.**—A purchaser of a stallion from the owner's general agent, who had authority to warrant that the horse was of average breeding qualities, has, in the absence of any information to the contrary, the right to assume that he has the authority to warrant the horse to be a "sure foal getter."—*First National Bank v. Robinson*, 463.
5. **SAME.**—One authorized to sell several horses to any one whom he can induce to purchase is a general agent.—*Idem*.
6. **Negligence of Agent.**—The failure of an agent who as clerk of the district court, could have easily ascertained whether an action affecting the property he was employed to buy had been dismissed, as appeared by the records, or was still pending, must be imputed to his principal, who must be held to have due notice of the rights of plaintiffs therein at the time of the purchase from defendants.—*Furry Bros. v. Ferguson*, 231.
7. **Payment—AUTHORITY**—An agent has no authority to accept an installment of principal on a note more than two years before its maturity and more than one year before the date at which the maker has the option to pay it; and a payment made by the maker to the agent is not binding upon the principal, where the principal had consented to its payment on the condition that he should have notice before it was paid, which condition was not observed.—*Dillenbeck v. Rehse*, 749.
8. **APPARENT AUTHORITY**—An agent authorized to collect interest coupons and installments of the principal, has implied authority to accept payment before maturity, where the principal has been accustomed to forward coupons and insist upon the prompt payment of such coupons, and of the installments of principal, long before their maturity.—*Idem*.
9. **Same**—A vendor of land who has the note and mortgage given for the purchase price made payable at the office of an investment company at which a note and mortgage for other land previously sold to the same purchaser had been made payable, and to which company payment was duly made and forwarded

AGENCY Continued

by it to the vendor, cannot recover from the purchaser for money paid to such company on the second note and mortgage, although it is not forwarded to the vendor, and it did not, at the time of receiving the payment, have the note and mortgage. Especially when payment to such agent was not for the payer or his convenience, and where the agency, if not wholly needless, was used for the convenience of the payee.—*Wolford v. Young*, 512.

10. **COLLECTION AGENCY**—*Banks*—A bank secured its indebtedness to a creditor bank by putting up, as collateral, notes signed by third persons, and payable to and at debtor bank. The course of business was that, when a note became due or was to be paid it was sent for by debtor bank, and other notes sent in exchange therefor, if necessary to protect the indebtedness. It was not shown that creditor bank ever directly authorized debtor bank to collect a note which had not been returned to it. *Held*, that the debtor bank had no authority to receive payment for notes in the hands of creditor bank.—*Bank of Montreal v. Ingerson*, 349.
11. *Same*—The fact that notes are payable at a bank does not of itself, in the absence of the notes, authorize the bank to collect anything thereon before maturity.—*Idem*.
12. *Same*—A bank holding notes as collateral to be sent to debtor bank for collection, and payable at a certain date, need not have the notes in the hands of the collecting bank before the date fixed for payment.—*Idem*.
13. *Same*—A bank at which notes are made payable is not authorized after assigning the notes as collateral security to receive payment of the same before they are due, in the absence of the note.—*Idem*.
14. *Same*—A bank at which a note is made payable has no authority to bind one to whom it has assigned the note by receiving payment on maturity of the note, where it has not received the note for collection.—*Idem*.
15. *Same*—A bank at which is made payable a note assigned by it as collateral security under an agreement by which it is to receive payment of notes so assigned at their maturity and give other notes as collateral, cannot bind its assignee by crediting on the notes before maturity an amount previously deposited by the maker, in such bank.—*Idem*.
16. **MORTGAGE**—A mortgagee of land authorized by one to whom he has assigned the mortgage to collect the notes secured thereby, is not authorized thereby to receive other notes in payment.—*Savings Bank v. Colby*, 424.

AGENCY Continued TO ALIENATING WIFE'S AFFECTIONS

17. **RELEASE**—A mortgagee of land cannot rightfully release the mortgage after an assignment thereof, unless authorized by the assignee.—*Idem*.
18. **Notice**—That one of several notes secured by mortgage is paid a considerable time before maturity to the mortgagee who is authorized by the assignee of the mortgage to collect the notes, is not necessarily notice to the assignee that the mortgage has been satisfied, and other notes and a mortgage taken in lieu thereof by the mortgagee.—*Idem*.

ALIENATING WIFE'S AFFECTIONS.

1. **Evidence**—Evidence that the wife of plaintiff in an action for alienating her affections went on one or more occasions to defendant's room and requested him to arrange the bandage on her arm which was injured, is admissible to show that she had an affection for defendant.—*Childs v. Muckler*, 279.
2. **SAME**—Evidence that the wife of plaintiff in an action for alienating her affections took a ride at one time with defendant when plaintiff would have taken her if he had known she wanted to go, is admissible, as it bears on whether she went with defendant from choice or necessity.—*Idem*.
3. **Harmless Error**—Error, if any, in admitting opinion evidence that the wife of plaintiff in an action for alienating her affections was a "nice looking woman," was harmless to defendant where she was present as a witness and gave testimony in the case, thus permitting the jury in a proper way to see how she looked.—*Idem*.
4. **Opinion Evidence**—Opinion evidence is admissible in an action for alienating the affection of plaintiff's wife as to whether or not she was "nice looking"—*Idem*.
5. **Instructions**—An instruction in an action for alienating the affections of plaintiff's wife that it was defendant's duty to refrain, so far as he reasonably could, from any act which he knew would tend to awaken an affection for him on the part of plaintiff's wife is not objectionable as intimating that he should have known that common courtesy or civility would have that effect.—*Idem*.

AMENDMENT—See ATTACHMENT, 1; PRACTICE, 2, 3, 4.

ANSWER—See PLEADING, 3.

APPEAL—See PRAC. SUP. CT.; PRACTICE, 24.

APPRAISEMENT—See TAXES, 2, 3.

ASSESSMENT—See INSURANCE, 1.

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ASSIGNMENT

TO

ATTORNEYS

ASSIGNMENT—See AGENCY, ¹⁶, ¹⁷; ATT'YS, ³; JUDGMENTS, ¹; MECH. LIEN, ², ⁴, ¹⁶; MORTGAGES, ⁷; PRACT. ¹⁶.

CONSTRUCTION—An assignment of a claim arising from an erroneous decree subjecting property to judgment liens was "for property taken and money paid as costs and * * * to redeem from sale made under * * * a decree entered" in an equity suit named. *Held*, that this language sufficiently expressed an intent to assign claims arising out of execution sales on judgments made liens by the decree, on the property sold.—*Weaver v. Stacey*, 657.

ASSIGNMENT OF CAUSES—See PRACT. ⁵

ATTACHMENT.

1. **Pleading—Amendment**—An attaching creditor may be permitted to amend his petition after the writ is sued out so as to show that legal cause for attachment existed at the time the writ was issued, by alleging an additional ground of which he was not informed until after the levy, under Code, section 3021, providing that no attachment shall be quashed or dismissed, or the property attached released because of a defect in the proceedings if the same has been or can be amended so as to show that a legal cause for attachment existed at the time it was issued.—*Citizens State Bank v. Converse*, 669.
2. **Wrongful Attachment—EVIDENCE**—Evidence that the attaching creditor, before the writ was sued out, was shown a telegram addressed to his attorney by another creditor whom the attorney represented stating that the debtor was sure to fail and directing him to attach at once unless the debtor should secure the claim is admissible on the question as to whether or not the attachment was wrongfully sued out, raised by the defendant's counter-claim for damages.—*Idem*.
3. *Same*—Mortgages executed by an attaching defendant on the same day but after the attachment was levied are admissible in favor of the attaching creditor upon the issue raised by the defendant's counter-claim for damages for wrongfully suing out the attachment.—*Idem*.
4. *Same*—On an issue as to wrongful attachment, written bids for the property made after advertisement by the receiver appointed therein are admissible in evidence, as tending to show whether the goods sold for a fair price, even if not of themselves sufficient to prove the value.—*Idem*.

ATTORNEYS—See LIBEL, ⁶; PRACT. SUP. CT. ¹¹, ¹².

1. **Lien**—An attorney's lien upon moneys and papers for his services is purely possessory, and cannot be actively enforced,

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ATTORNEYS Continued

TO

BONA FIDE PURCHASER

but is a mere right to retain the papers until settlement and payment of what is justly due him.—*Foss v. Cobler*, 728.

2. **Employment by Heir—PARTIES**—An attorney employed by the sole heir of an intestate to protect her interest in the estate has no lien by virtue of Code, section 321, for services rendered to her, upon funds in his hands belonging to the estate, as the administrator and not the heir has the right to the possession of the fund, and because a lien may be had upon funds of the estate for services rendered the administrator. And, hence, the administrator is not the proper party to a suit against the heir for services in protecting her interests in the estate, in which a lien is sought on such fund.—*Idem*.
3. **EQUITABLE ASSIGNMENT**—An equitable assignment *in toto* or *pro tanto* of a fund in the hands of an attorney belonging to the estate is not effected by a letter from the sole heir directing him to protect her interest in the estate, and pay himself out of the money in his hands. It amounts to no more than an agreement that the attorney shall be paid out of the funds in his hands.—*Idem*.

ATTORNEYS FEES—See ESTATES OF DECEDENTS, ⁵, ⁶.

BANKS—See AGENCY, ¹⁰ to ¹⁶; CHECKS, ¹ to ⁶; EVID. ²²; MORTGAGES ⁷; SAVINGS BANKS.

TRUST FUNDS—An assignee for creditors, who deposits funds in a bank which subsequently becomes insolvent, is not entitled to recover the amount deposited from the assignee of the bank as trust funds, where the bank had on hand only a very small amount in cash at the time it failed, the money so deposited was mingled with other money and used by the bank in the usual and ordinary course of business in the payment of its debts, and no new loans were made by the bank and no property of any kind or securities on hand had been purchased with the money so deposited.—*Jones v. Chesebrough*, 303.

BILL OF EXCEPTIONS—See PRACT. SUP. CT. ¹³, ¹⁴.

BLACKMAIL—See DURESS, ¹, ².

BONA FIDE PURCHASER—See ADVERSE POSSESSION, ⁶; CHECKS, ¹; EVIDENCE, ¹¹; INTOX. LIQUORS, ², ³; LIS PENDENS; MORTGAGES, ⁶; SALES, ¹, ², ⁴.

1. **Execution Sale—NOTICE OF MORTGAGE WITH WRONG DESCRIPTION**—A debtor mortgaged his farm and shortly afterwards defendant commenced an action, and bought it in at an execution sale resulting. The mortgage was recorded, but by a misdescription located the land in range 30, instead of 36, the correct number. Defendant before sale, was told that the bank

BONA FIDE PURCHASER Continued

TO

BONDS

which plaintiff represents had a mortgage on debtor's farm in A. county. There was no range 80 in A. county and debtor had only the one farm in such county, where the mortgage was recorded. *Held*, sufficient to put the purchaser on inquiry, and charge him with notice that the mortgage was senior to his lien.—*Fry v. Warfield*, 559.

2. **Lien on Equitable Title**—Where certain land, the equitable title to which was in a judgment debtor, had been, previous to the rendition of the judgment in question, conveyed by the holder of the legal title, in trust, to secure the payment of certain indebtedness of the equitable owner, and had, subsequently thereto, and after the satisfaction of such trust, been conveyed by the legal owner and such trustee to the grantor of the promoters of a certain corporation, to whom it was conveyed by him in good faith, in consideration of a certain amount of stock of such corporation, without notice of such equitable ownership on the part of the judgment debtor, or of the fact that the judgment creditor claimed a lien thereon, such subsequent purchasers were entitled to protection as against such judgment creditor.—*Iron Co. v. Iron Co.*, 624.

BONDS—See PRACT. 24, 25.

1. **Consideration**—Where a bond was given to secure future as well as present indebtedness, and new debts were afterwards contracted, and old ones extended, there is a consideration to support it, although, when it was given, the debts amounted to more than the amount of the bond.—*Savings Bank v. Bodicker*, 548.
2. **Construction of—Future debts**—A bond recited that its purpose was to fully indemnify the obligee from the failure of the principals "to pay their indebtedness now owing (or which may be contracted hereafter)." *Held*, that the bond besides renewals of existing indebtedness, covered future indebtedness notwithstanding a recital that the condition of the bond was that the principals "shall pay the full amount of their indebtedness."—*Idem*.
3. **Same**—A bond in the sum of five thousand dollars given to secure future indebtedness, does not limit the indebtedness the principal may incur, but only the amount which the bond should secure.—*Idem*.
4. **Wrongful Delivery—NOTICE TO OBLIGEE**—Where a bond was delivered by the principal in violation of a condition on which it was signed by the sureties, the obligee may nevertheless

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recover thereon, if he shows that he was ignorant of the conditions on which the sureties signed, and that he took the bond in good faith, and for sufficient consideration.—*Idem*.

5. *Same*—It is error to charge that the obligee of a bond may recover thereon unless he has *express* notice that the bond is being delivered in violation of a condition upon which a surety signed it. It was sufficient notice if obligee had knowledge of such facts as would have caused a person of reasonable prudence to investigate and discover that the delivery was not authorized.—*Idem*.

BOOKS OF ACCOUNT—See **LEVY**.

BOUNDARY LINES—See **COURTS**; **PRACT. SUP. CT.** ⁵⁰.

BURDEN OF PROOF—See **CHECKS**, ³; **EVIDENCE**, ³, ¹¹; **FRAUDULENT CONVEY.** ³; **MECHANICS' LIENS**, ⁴; **RAILROADS**, ¹².

CHANGE OF FORUM—See **PRACT. SUP. CT.** ⁴⁸.

CHANGE OF VENUE—See **ESTATES OF DECEDENTS**, ⁴; **PRACTICE**, ⁴; **PRACT. SUP. CT.** ¹⁷.

CHECKS—See **EVIDENCE**, ²².

1. **Indorsement**—**RIGHTS OF THIRD PARTIES**—An agent received of his principal's debtor a check for the debt, payable to him as agent. He indorsed the check as agent and gave it to the debtor, saying that he wished a draft instead of the check. The debtor took the check and purchased a draft with it. There was nothing to show that the bank had any knowledge of the debtor's want of authority to put the check in circulation. *Held*, that such facts were not a defense to an action by the bank against the agent as indorser of the check, the defense resting on the ground that the indorsement by the agent amounted to surrendering the check to its maker.—*Bank of Stratton v. Dixon*, 148.
2. **Presentation**—In the ordinary course of business a check received by the payee sixteen and three-fourths miles from the bank upon which it was drawn, should be presented for payment, at the latest, the second day after its receipt.—*Hamlin v. Simpson*, 125.
3. **BURDEN OF PROOF**—The burden of proof is upon the payee of a check to show that the drawer was not injured by the former's failure to present the check for payment within a reasonable time.—*Idem*.
4. **OVERDRAFTS**—Although the drawer of a check has not sufficient funds on deposit to meet it, if he has grounds for belief that it will be honored, it is the payee's duty to present it for payment;

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COMPOUNDING FELONY

and a failure to do so will release the drawer if he is damaged thereby.—*Idem*.

5. **SAME**—The drawer of a check had on deposit with a bank drawn on, two thousand dollars, for which he held a certificate of deposit, but had no general funds to his credit. He claims that he had an arrangement whereby he was permitted to check against such certificate, and in fact had been allowed to overdraw his general account. *Held*, that he had reasonable ground to believe the check would be paid.—*Idem*.
6. **KNOWLEDGE OF INSOLVENCY**—Where a check was drawn upon a bank which was insolvent, the fact that three days later the drawer deposited more than enough to meet the payment of the check is decisive evidence that he had no knowledge of the insolvency when he drew the check.—*Idem*.

CLOUD ON TITLE—See **ADVERSE POSSESSION**, ³.

COLLATERAL ATTACK—See **JUDGMENTS**, ³, ³, ⁴.

COLLATERAL INHERITANCE—See **TAXES**, ¹, ², ³.

COMPOUNDING FELONY.

1. **ADULTERY**—*Public Policy*—By an agreement for the settlement of a civil action for seduction plaintiff was to destroy all the evidence in his possession or under his control, which would tend to prove or connect defendant with the acts charged or claimed to have been done by him. It appeared from the agreement that no criminal prosecution was intended by the parties having the right to prosecute. *Held*, that, as the prosecution of the plaintiff's wife was at the option of her husband, and that of the defendant at the option of his wife, the principle of public policy does not apply, as in cases where the prosecution may be otherwise instituted.—*Sloan v. Davies*, 97.
2. **WRITTEN COMPROMISE**—*Law Question*—An agreement showed on its face that it was intended as a settlement of a civil action and contained no reference to a criminal prosecution. *Held*, that, the consideration of the settlement was not, as a matter of law, the compounding of a felony, nor contrary to public policy.—*Idem*.

COMPROMISE—See **COMPOUNDING FELONY**, ².

CONDITIONAL SALE—See **SALES**, ¹, ².

CONFESSION—See **JUDGMENTS**, ⁷.

CONSIDERATION—See **AGENCY**, ¹; **BONDS**, ¹; **CONTRACTS**, ¹, ², ³, ⁴;
FRAUD CONVEY. ¹; **INSURANCE**, ¹⁰; **MORTGAGES**, ¹.

CONSOLIDATIONS—See **PRACTICE**, ⁷, ⁸.

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CONTRACTS

CONSTRUCTION—See ASSIGNMENT, ¹; BONDS, ²; CONTRACT, ⁴; CORPORATIONS, ⁴; ESTATES OF DECED., ²; INSURANCE, ⁴; JURISDICTION, ²; LANDLORD AND TENANT, ¹; SAVINGS BANKS; TAXES, ¹, ², ³.

If a statute is ambiguous or obscure, the court will consider consequences, in interpreting it.—*In re Estate of King*, 320.

CONTRACTS—See AGENCY, ¹; DURESS, ¹; EVIDENCE, ¹⁴; INSURANCE, ⁴; INTEREST; LANDLORD AND TENANT, ¹; LIMITATIONS OF ACT, ¹; LIENS, ¹; RAILROADS, ².

1. **Consideration**—A lessee's abandonment of his right to rescind the lease because of fraudulent representations of the lessor respecting the water supply is a sufficient consideration for an agreement by the latter, after the execution of the lease, to furnish a supply of water.—*Sisson v. Kaper*, 599.
2. **SAME**—The settlement of an action for the seduction and the alienation of the affections of plaintiff's wife is sufficient consideration for money paid and notes given by defendant to secure such settlement.—*Sloan v. Davies, Keck, et al.*, 97.
3. **SAME**—An agreement which is merely a completion of a former contract may be supported by the same consideration.—*Griffith v. Fields & Bryant*, 362.
4. **Statute of Frauds**—A verbal statement to a landlord by one on whose farm the tenant is to go the next season, that he will see that the landlord is paid his rent, and that he will pay it before a specified time, is, where the lessor's lien is not released, a mere naked promise and void within the statute of frauds.—*Griffith v. Hoag*, 499.
5. **Construction by Parties**—**PERFORMANCE**—When decedent's youngest child was four years old he agreed to convey land to plaintiff if he would assist in caring for decedent's children until they could look after themselves. Plaintiff rendered such assistance for seven years, when decedent said that plaintiff had earned the land and gave him possession thereof. *H. W.*, that decedent being satisfied, his widow could not claim that plaintiff had not complied with the contract.—*Mills v. McCaustland*, 187.
6. **Corporation in Foreign State**—**Presumptions**—A contract of insurance is presumably enforceable in the state under whose laws it was issued, even if the insurer is a foreign corporation.—*Green v. Life Association*, 628.
7. **Husband and Wife**—**Distributive Share**—Code, 1873, section 2203, providing that, when property is owned by either the husband or wife, the other has no interest therein which can

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- be the subject of a contract between them, applies to both personal and real property, so that an agreement, by the husband, relinquishing all claim to the separate personal property of his wife, is of no effect to bar his obtaining his distributive share in the estate of his wife.—*Poole v. Burnham*, 620.
8. **Insane Persons**—A contract cannot be avoided on the ground that one of the parties thereto was insane or of unsound mind when he entered into a contract, free from fraud or undue influence and made upon adequate consideration, unless such unsoundness or insanity was of such character that he had no reasonable perception or understanding of the nature and terms of the contract.—*Elwood v. O'Brien*, 239.
 9. **Evidence**—It will be presumed that a person was sane when he executed a contract, although he was adjudged insane eight days thereafter.—*Idem*.
 10. **Members of Family**—Where plaintiff went to live with defendants when a child and continued to live with them as one of their family after becoming of age, the presumption is that his services were gratuitous, and to recover he must overcome this presumption by showing either an express promise to pay for the services, or that services were rendered and received with the expectation of being paid for.—*Salvador v. Feeley*, 478.
 11. **RULE APPLIED**—Plaintiff was brought up by defendants as a member of their family. Defendants told him that they did not expect him to do work for nothing; that he would be paid for all he did; and that on coming of age he would be given a piece of land. At another time they promised him a team and harness when he attained his majority. *Held*, that this did not show an express promise to pay for the service before plaintiff attained his majority, but tended to rebut the presumption that the services were gratuitous.—*Idem*.
 12. **Sale and Return**—A contract between a manufacturer and retail dealer provided that the dealer should act as special agent in the sale of certain patterns; that manufacturer should furnish patterns to a certain amount, and the dealer should pay for them half in cash and half by interest bearing standing credit; that dealer should pay for all other goods "purchased" from manufacturer before the fifteenth of the succeeding month; that old patterns might be exchanged for new ones, but not "in payment for goods ordered prior to the time of return;" that dealer's failure to keep in stock at least three

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hundred dollars worth of patterns should entitle the manufacturer to declare the contract forfeited, and the standing credit due; that either party might terminate the contract after a year, on three month's notice, and that, if so terminated, the dealer should have the right to return all patterns on hand to manufacturer and receive seventy-five per cent of the price paid therefor. *Held*, a contract of sale and not a contract on "sale or return"—Butterick Publishing Co. v. Bailey, 326.

18. **LOSS OF GOODS BY FIRE**—The loss by fire of goods obtained and partly paid for under a contract which obligated one party to exchange other goods for them, and under certain conditions, to accept and pay a certain price for them, does not relieve the other party from liability to pay the balance due.—*Idem*.

CORPORATIONS—See **CONTRACTS**, 6; **DAMAGES**, 1, 6, 6, 7; **PLEA AND PROOF**, 11; **PRACTICE**, 21, 22, 23.

1. **Dissolution**—A corporation incorporated for a specified term of years, with the right of renewal, continues to exist for the purpose of discharging its obligations and disposing of its property, after the expiration of such time, under Code, Section 1629, providing that corporations, whose charters expire by limitation, may nevertheless continue to act for the purpose of winding up their affairs.—*State of Iowa v. Fogarty*, 32.
2. **In Foreign State**—**SERVICE OF SUMMONS**—A power of attorney executed by a foreign corporation in attempted compliance with North Dakota compiled laws, section 8192, requiring foreign corporations to appoint an agent residing at some accessible point, duly authorized to accept service of process, and upon whom service of process may be made with the same effect as upon the corporation, is sufficient to render service upon the agent named therein binding upon the corporation without his acceptance thereof, although the power, in terms, merely authorizes the agent to accept and acknowledge the service of process and did not expressly authorize service to be made upon him without his acceptance.—*Green v. Life Association*, 628.
3. **SAME**—It is competent for a state to require foreign corporations to appoint an agent or attorney upon whom service of process may be made as a condition of doing business in the state.—*Idem*.
4. **SAME**—Where a foreign insurance company appoints an agent in a state, and did business therein, it is conclusively presumed to have assented to a statute providing that, when such company ceased to do business in such state the agent last designated by it to receive service shall be deemed to continue as its attorney for such purpose.—*Idem*.

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5. **CONSTRUCTION OF STATUTE**—Where the laws of another state provide in one statute that no foreign corporation shall do business therein without having an authorized agent or agent on whom process may be served, and in another statute that a foreign insurance company shall, before doing business, appoint the commissioner of insurance to be its agent for service, but does not make the latter statute exclusive, service on an agent of a foreign insurance company appointed under the former statute will confer jurisdiction.—*Idem*.
6. **Stockholder's Liability**—The sale, though made in good faith, by a stockholder in a corporation of his stock, only a small part of the par value of which has been paid, does not terminate his liability for the existing debts of the company, under Code, 1878, section 1078, providing that the transfer of shares is not valid except as between the parties unless it is regularly entered on the books of the company, but that such transfer shall not in any way exempt the person making it from any liability of the corporation created prior thereto, and section 1082, providing that nothing contained in such chapter shall exempt the stockholders from individual liability to the amount of the unpaid installments on the stock owned by them or transferred by them for the purpose of defrauding creditors.—*White v. Green*, 176.
7. **POWER**—A corporation organized to do business as a dealer and jobber in jewelry without any limitation as to the kind of property which it might take in exchange for its merchandise, cannot escape liability as a stockholder on stock of another corporation received in exchange for its jewelry, on the ground that it had no power to acquire such stock, where it has had all the benefits of the exchange and has sold the stock received, retaining the proceeds.—*White v. Marquardt*, 145.
8. **TRANSFER OF STOCK**—*Recording*—A purchaser of corporate stock is not relieved from liability as a stockholder for corporate debts, simply because the transfer of the stock was not recorded in the books of the corporation.—*Idem*.

CORROBORATION—See CRIM. LAW, 80.

COSTS—See DAM. 1, 7.

GOVERNOR'S REMISSION—The governor has no power to remit or suspend the collection of the costs awarded against the defendant on the trial of an indictment for keeping a liquor nuisance.—*State v. Mateer*, 66.

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CO-TENANCY

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CO-TENANCY—See ADVERSE POSSESSION, ², ⁴.

1. **INJUNCTION**—One in possession of land as a tenant in common, is entitled to an injunction restraining her co-tenants from any interference with such possession.—*Roger v. Turpin*, 188.
2. **Ouster**—One tenant in common of land, who ousts the other from possession, is liable for the reasonable rental value of the land, and not merely for the amount which he received therefor.—*Boggs v. Douglass*, 344.
3. **SATISFACTION OF LIEN**—A judgment plaintiff in lawful possession of land on which his judgment is a lien has no right to apply the rents and profits derived therefrom to the satisfaction of such judgment as against the owner of such land who is not a judgment defendant.—*Idem*.
4. **Taxation**—One tenant in common cannot against his cotenant acquire a valid tax title to the land owned in common.—*Funson v. Bradt*, 471.

COURTS—See JURISDICTION, ¹.

Jurisdiction—**BOUNDARY LINE CRIMES**—The county which first acquires by proper proceedings, jurisdiction of the person in case of a crime committed within five hundred yards of a county line retains such jurisdiction to the end, under Code, 1878, section 4160, providing that when a public offense is committed within that distance of the boundary line of two or more counties the jurisdiction is in either county.—*Carter v. Barlow*, 78.

COVENANTS—See DEEDS.

CRIMINAL LAW—CORPORATIONS, ¹; COURTS; EVID. ², ⁹, ¹⁰, ²⁰; INTOX. LIQUORS, ⁵; JURISD. ¹; PRACT. SUP. CT. ¹⁶, ²², ²³, ²⁴, ³¹, ³⁷, ⁵⁰.

Burglary—See ³, *post*.

Corroboration—See ²⁰, *post*.

Cross Examination—See ⁴, ⁵, ⁶, ¹¹, ²⁴, ²⁵, ³³, *post*.

Dogs—See ²², *post*.

1. **Embezzlement**—**INDICTMENT**—An indictment for embezzlement by an attorney, of money entrusted to him by a client, need not set out the kind or character of the money embezzled, under Code, 1873, section 4317, providing that in an indictment for embezzlement it shall be sufficient to allege the embezzlement to have been of money generally, without designating its particular species.—*State v. Alverson*, 152.

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2. *Same*—An indictment alleging that defendant had fraudulently embezzled "the sum of \$100.00" of the money received by him as attorney at law, sufficiently states that the value of the property alleged to have been embezzled, exceeds twenty dollars.—*Idem*.
3. **Evidence**—See ^{10, 16, 18, 20, 21, 23, 26, 27, 28, 29, 30, 32}, *post*. The evidence, when taken as a whole and fairly considered, must, in order to justify a conviction of a crime, so satisfy the judgments and consciences of the jury as to exclude every other reasonable conclusion, but absolute certainty is not required.—*State of Iowa v. Marshall*, 38.
4. **CROSS-EXAMINATION**—On cross-examination in criminal cases, inquiry may be made concerning defendant's different occupations and places of residence, the extent to which such inquiry may be carried, resting in the sound discretion of the court.—*State v. Chingren*, 169.
5. *Rule Applied*—A question asked of defendant on cross-examination in a criminal trial as to the business he conducted at a given fair is not improper, although the answer shows that he was engaged in a gambling occupation.—*Idem*.
6. *Harmless Error*—Defendant in a criminal trial is not prejudiced by the question put to him on cross-examination whether a certain business institution which he had testified he had conducted was a gambling institution, where such question was immediately withdrawn.—*Idem*.
7. **JURY QUESTION**—The truthfulness of an explanation of the possession of stolen goods, although uncontradicted, must be determined by the jury.—*State of Iowa v. Marshall*, 38.
8. *Rule Applied*—On a trial for burglary, to commit larceny, the evidence showed that the goods in the possession of the accused were identified as the goods stolen; that the accused worked in a bakery adjoining the store from which the goods were stolen; that he had access to the bakery at all times; that the bakery and adjoining store were separated by a board partition, containing a window; that a screw driver used in the bakery fitted marks made on the window and partition; that possession was explained by the purchase of the goods from strangers; that the accused's father and mother claimed to have seen two strangers leaving the bakery about the time of the alleged purchase. *Held*, sufficient to support a conviction.—*Idem*.
9. **MATTERS OF COMMON KNOWLEDGE**—Evidence that it is the custom to mark up the price of land when it is being

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traded for goods is properly excluded on a trial for cheating by false pretenses, as it is a matter of common knowledge that in the making of exchanges of property the prices are not fixed at cash values. --State v. Chingren, 169.

10. **False Pretences — ADMISSIONS** -- Evidence that defendant charged with obtaining a stock of merchandise by false pretenses had stated to a specified witness, soon after the trade, that he had invoiced part of the goods and that they amounted to nine hundred dollars is admissible to rebut evidence by the defendant that the goods were of little value. — *Idem*.
11. **CROSS-EXAMINATION** — Defendant charged with cheating by false pretenses in pointing out as his wife's land which he proposed to exchange for a stock of goods, other land of better quality, may be cross-examined as to whether any money was paid by either him or his wife for the land given in exchange for the goods and as to whether a mortgage given by them on the land was a sham, where he testifies on his examination in chief that his wife owned the land, and that there was a mortgage on it and that the mortgagee went with him to examine certain property with a view of changing the security from the land. — *Idem*.
12. **IMPEACHMENT** — Evidence of statements made by defendant showing the value of goods which he is charged to have obtained by false pretenses is admissible without laying a foundation, as he is a party to the action. — *Idem*.
13. **INDICTMENT** — An indictment for obtaining property by false pretenses, which alleged that the note given in payment for the property was represented to be good and of par value, that such representations were false and known to be so, and that the property was received because of them, stated an offense. — State v. Nine, 131.
14. **Immaterial Allegations** — In an indictment for obtaining property by false pretenses, an averment that the notes given in payment of the property were "assigned and transferred" does not charge that they were indorsed; and allegations that defendant falsely represented the financial worth of the assignor and thereby obtained credit; thus assuming the assignor, to be an indorser, are immaterial. As it was not charged that the notes were indorsed, the financial standing of one asserted to have indorsed them cannot be material. — *Idem*.
15. **Submission of** — Where an indictment charged several false representations, any one of which, if material, might have

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- been the basis of a conviction, it was erroneous to submit to the jury such representations as were immaterial.—*Idem*.
16. **VARIANCE**—It is not a fatal variance in a prosecution for cheating by pointing out a wrong tract of land, where it is alleged that defendant pointed out the land in question as belonging to him, that the proof was that he said it belonged to his wife; since there might be a conviction on the further allegation that defendant pointed out a tract owned by neither him nor his wife.—*State v. Chingren*, 169.
17. *Same*—Where an indictment for cheating charged that prosecutor did "bargain and trade and set over and deliver" to defendant a stock of goods, which was received by him and taken into his possession, and the evidence was that the bargain was made with the defendant, and delivery made to him, there was no variance though the bill of sale was delivered to defendant's wife, it having been done at his request, since the fact that the defendant was acting for his wife was not sufficient to relieve him from responsibility for his unlawful act.—*Idem*.
18. **SCIENTER—Evidence**—In a prosecution for cheating by pointing out to prosecutor a wrong tract of land in a transaction where land was traded for goods, evidence that defendant had pointed out the same land to another, and said that about twenty acres of it was in the slough, is admissible on the question of knowledge, where defendant testified that he did not know the corners and lines of the land which he was trading.—*Idem*.
19. **Grand Jury—MINUTES OF EVIDENCE**—The use by the grand jury of the minutes of a witness examined before the committing magistrate is equivalent to an examination of the witness before such grand jury, under Code, 1873, section 4421, when construed in connection with sections 4273, 4289.—*State of Iowa v. Marshall*, 38.
20. **EVIDENCE**—It will be presumed that the evidence of witnesses whose names were endorsed on an indictment and the minutes of their evidence returned therewith, were properly before the grand jury, and such presumption can be overcome only by an affirmative showing that they did not testify before the grand jury, and that no notice was served, and, also, that they either did not give evidence before the committing magistrate, or that the minutes thereof, made by him, were not used by the grand jury.—*Idem*.
21. *Same*—Other evidence than the minutes is admissible on the trial to determine whether or not a witness was in fact examined before the grand jury or committing magistrate, although

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the minutes returned with the indictment are made, by the statute, conclusive as to what names are or should be indorsed on the back of the indictment.—*Idem.*

Harmless Error—See ⁴, *ante.*

Impeachment—See ¹², *ante.*

Indictment—See ¹, ², ¹², ¹⁴, ¹⁵, ¹⁶, ¹⁷, *ante.*

Instructions—See ²¹, *post.*

Jury: Question—See ¹, *ante.*

22. **Larceny**—See ¹, ², *ante.* **DOG**—A dog is the subject of larceny, being comprehended in the term “chattels,” as used in Code, 1873, section 3902, defining such crime.—*Hamby v. Samson*, 112.
23. **EVIDENCE**—Evidence that defendant, charged with larceny, wanted to borrow money on the stolen property, is admissible on the question whether defendant, in assisting another person in bringing it to the place where it was afterwards found, or in bringing it himself, with such other person's assistance, had the intention of stealing the property or aiding therein.—*State of Iowa v. Fogarty*, 32.
24. **Cross-Examination**—Where, in a prosecution for larceny, a witness testified that defendant brought the property to his shop and endeavored to borrow money upon it, questions, on cross-examination, as to whether witness had not informed others that part of the property belonged to him and had been in his possession for over two years, are properly excluded, where no complicity on part of the witness was shown.—*Idem.*
25. **INDICTMENT**—An indictment for larceny alleging that the property taken belonged to the “Skinner Manufacturing Company” is not insufficient for failure to allege that such company is either a corporation or a partnership.—*Idem.*

Minutes of Evidence—See ¹⁹, ²⁰, ²¹, *Ante.*

26. **MURDER—Sufficiency of Evidence**—Two policemen were shot in certain railroad yards. One was killed outright, but before the other expired he indicated by signs that they had been shot within a passenger coach by two men who had escaped. A witness saw two men run away immediately after the shooting, and their tracks were found. He was eight and one-half feet from the men, and identified one as R, and described the other as of size and dress similar to defendant. A window in the coach was broken out, which a witness heard done immediately after the shooting, and there were blood stains on the coach. The bullets shot were thirty-eight caliber, and a thirty-eight caliber revolver was found next day not far from the coach.

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It was of blue steel, and bloody, and bullets therein were battered at the ends. Two nights before the killing defendant was at a hotel where the clerk took from him a blue steel revolver and in removing the bullets therefrom he battered the ends. The clerk returned the revolver the next morning with the bullets replaced, defendant claiming it as his property. The clerk identified the revolver found as that of defendant. Defendant and R. robbed several people on the night previous to the shooting, and the policemen killed were notified of this fact. Defendant and R. were seen together after the shooting at different times and places until arrested. When arrested, they were told that they answered the description of the persons who killed the policemen, and were arrested for that reason. Defendant instantly inquired with anxiety whether both were dead. He also admitted being at said hotel on the night mentioned, and that his revolver was taken from him. *Held*, that the evidence supported a conviction for murder.—*State v. Healy*, 162.

27. EVIDENCE—Evidence that defendant, charged with murder of special policeman, and two other persons had held up different persons shortly before the crime was committed, is admissible to show that such policemen had the right to arrest them, and that defendant had a motive to resist.—*Idem*.
28. *Same*—Evidence that a special policeman for whose murder defendant is on trial, said a short time before the crime was committed that he was looking for some persons who were "holding up" people in the neighborhood, and that they could not be far away, is admissible to show what such policeman was doing at the time of the murder.—*Idem*.

Perjury—See 22, 23, *Post*.

Practice—See 16, *Ante*.; 24, *Post*.

29. Seduction—A finding that defendant charged with seduction of a girl seventeen years old made use of seductive arts, is sustained by evidence that he was on very friendly terms with the prosecutrix; that she was intimate with his family, and that at the time of the alleged seduction he put his arm around her and began to coax and flatter, and told her it would not hurt her to have intercourse with him.—*State of Iowa v. Hayes*, 82.
30. CORROBORATION—Corroboration of prosecutrix' statement that defendant committed the seduction may be found in the relation of the parties and the attending circumstances.—*Idem*.
31. INSTRUCTIONS—Though prosecutrix, on rebuttal, stated the date on which she had intercourse with the defendant a week earlier than on her first examination, an instruction that the

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particular day was not material, provided the seduction occurred within eighteen months before the indictment is not objectionable as justifying the jury in inferring that defendant's evidence tending to show that he was not with prosecutrix at the time first stated by her, was immaterial and incompetent.—*Idem*.

32. **Subornation of Perjury**—In a trial for subornation of perjury, evidence of the testimony before a grand jury of a witness claimed to have been suborned was material, as bearing upon the motive of defendant in procuring him to testify otherwise on the trial of the indictment of defendant which was based upon this witness' testimony.—*State of Iowa v. Porter*, 677.

33. **INDICTMENT**—An indictment for subornation of perjury which charged in the language of the statute that the defendant suborned and procured a witness to testify falsely, need not set out the means or methods employed by defendant.—*Idem*.

34. **Trial**—**ABSENCE OF JUDGE DURING JURY ARGUMENT**—A conviction is not unlawful because the judge stepped out of the court room during some of the argument of defendant's counsel; where he was not out of hearing of counsel, but heard all that was said, and no prejudice appears.—*Idem*.

Variance—See 16, 17, *ante*.

CRIMINAL PRACTICE—See JURISDICTION 1.

CROSS-EXAMINATION—See CRIM. LAW, 4, 5, 6, 11, 24; EVIDENCE, 4; PRACTICE, 10; PRACT. SUP. CT., 26.

CUSTOM—See RAILROADS, 4.

DAMAGES—See COTENANCY, 2; FRAUD, 13; LIBEL, 7, 8; RAILROADS, 4.

1. **Eminent Domain**—The increased value of a lot at the time it was taken for depot purposes in condemnation proceedings, by reason of the anticipated construction of a depot in the locality, may be considered in determining the amount of the award of damages to the owner.—*Snouffer v. Railway Co.*, 681.
2. **INSTRUCTIONS CONSTRUED**—An instruction directing the jury, in assessing damages for the taking of land by a railroad, *not* to consider or *deduct* benefits derived on account of any enhanced value that has accrued to the owner by reason of any contemplated building of a depot thereon, cannot be construed as directing the jury to *add* such future accessions of value, where they are also instructed not to base their verdict on speculative values.—*Idem*.

DAMAGES Continued

8. **Personal Injury**—Allegations that plaintiff suffered permanent disability in consequence of an injury will support a recovery for such disability as it existed, though it were not permanent; and under such pleading, where the jury was instructed that plaintiff, alleging permanent injury, should recover all damages directly resulting therefrom, and sufficient to compensate for the extent and duration of the injury, and all damages, present and future, necessarily resulting, the fact that it specially found that the injury was not permanent does not limit the verdict to the actual pecuniary loss.—*Ankrum v. City of Marshalltown*, 493.
4. **Punitive Damages**—In the absence of actual damages, there can be no award of punitive damages, notwithstanding malice is shown.—*Boardman v. Grocery Co.*, 445.
5. **Stock Book Inspection**—*Action*—Code, 1873, sections 1076 to 1078, giving persons the right to inspect the stock books of any corporation, and requiring a posting of the by-laws, gives a right of action to anyone injured by a failure of the corporation to comply therewith.—*Idem*.
6. **SAME**—The value of plaintiff's time in endeavoring to secure the right to inspect the stock book of defendant corporation, and sums paid to his attorney therefor, are not recoverable as actual damages.—*Idem*.
7. **TENDER OF INSPECTION**—Where plaintiff sought the right to inspect the stock book of a corporation, which, by its answer, tendered him such right, and also tendered all the costs of the suit to date, his failure to dismiss the suit, where no actual damages had resulted, warrants the taxing of costs against him after the tender, though he is entitled to nominal damages.—*Idem*.
8. **Warranty**—*Breach*—Where machines are purchased of a manufacturer by a dealer, prospective profits are not a correct measure of damages resulting from a breach of the warranty that the machines were well made; but, if the dealer has not made a seasonable tender of the machines, his damages are the difference between the value of the machines as warranted and their actual value, to which he may add any expense necessarily incurred because of the breach of warranty.—*Checkrower Co. v. Bradley & Co.*, 537.
9. **SAME**—A purchaser of a stallion warranted to be a "good foal getter" cannot recover the cost of keeping the horse for breeding purposes after he learns it is not as warranted.—*Elwood v. McDill*, 437.

DEDICATION

TO

DEEDS AS MORTGAGES

DECLARATIONS—See EVIDENCE, ⁴.

DEDICATION—See RAILROADS, ⁸.

1. **Revocation—Acceptance**—An attempted dedication of land for streets by executing, acknowledging and recording a plat of a tract of land in accordance with Code, 1873, sections 559, 561, which is inoperative under the statute because of defects in the plat may be withdrawn by the donor at any time before acceptance by the public—*Railway Co. v. Town of Britt*, 198.
2. **Statutory Dedication**—The execution, acknowledgment and record of a plat of land on which certain streets are designated, will not constitute a valid dedication of the land where the plat does not give the length or breadth of either the lots or blocks and gives the width of only a few of the streets, except that it is stated thereon that it is drawn on a scale of one inch to one hundred and twenty feet and the initial point of the survey cannot be ascertained without going to another survey which is not in the record, under Code 1873, section 559, requiring such plat to accurately describe all the subdivisions of the tract and the breadth and courses of all streets, and section 561, providing that such plat when acknowledged and recorded is equivalent to a deed in fee simple of such parts of the land as are set apart for streets.—*Idem*.
3. **SAME**—An incompetent or defective statutory dedication of land for streets may be sustained as a common law dedication if the streets marked on the plat can be located with sufficient certainty and if there has been an acceptance by the public.—*Idem*.
4. **SAME**—An attempted dedication of land for streets by executing, acknowledging and filing a plat of the same as provided by Code, 1873, sections 559, 561, which is inoperative because of defects in the plat is revoked by the execution by the grantor, before the acceptance by the public, of a deed including the land designated as streets, without any reservation.—*Idem*.

DEEDS—See ADVERSE POSSESSION, ⁴; EVIDENCE, ⁴.

Covenants—A covenant in a deed to land that it is "free from incumbrances," is limited by a statement in the granting clause of the deed, that it is "subject to" an existing mortgage of a specified amount.—*Johnson v. Nichols*, 122.

DEEDS AS MORTGAGES—See HOMESTEADS, ⁴, ⁷.

1. **Defeasance**—The title of the grantee in a deed subject to defeasance becomes absolute if by agreement the defeasance is cancelled or surrendered.—*Haggerty v. Brower*, 395.

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DEEDS AS MORTG'S Continued

TO

DURESS

2. Evidence—On making a loan of three thousand dollars, the lender took a three thousand dollar mortgage to a third person, and a real estate and chattel mortgage to secure six hundred dollars, and a deed to himself, without assuming the three thousand dollar mortgage; and he testified that the grantor had called on him for a loan, was unwilling to allow a mortgage on his land to be foreclosed, and insisted on the lender's paying off the debt and taking a deed, giving him one year in which to repurchase. The grantor was unable to read or write, and testified that the deed was given only as security, and he was corroborated by members of his family. Held, that the deed should operate as a mortgage.—*Idem*.
3. SAME—Evidence that the grantor in a deed absolute on its face, but claimed by him to have been given to secure a debt, leased the premises from the grantee tends to show that the latter owned the land but is not conclusive on that point.—*Idem*.
4. Maxims—Once a mortgage always a mortgage.—*Idem*.

DEFAULT—See JUDGMENTS, ¹⁰; PRACTICE, ²⁹, ³⁰.

DEFEASANCE—See DEED AS MTGE. ¹.

DELIVERY—See BONDS, ⁴; MTGES., ²; NOTES, ¹, ².

DEMAND—See REPLEVIN, ¹.

DEMURRER—See PLEADING ² ²; PRACT. SUP. CT., ¹⁰.

DEPOSITIONS—See PRACTICE, ⁹, ¹⁰, ¹¹.

DESCENT AND DISTRIBUTION—See ESTATES OF DECEDENTS, ¹⁰, ¹¹; HOMESTEADS, ¹¹, ¹².

DEVISE—See ELECTION OF REMEDIES.

DIRECTED VERDICT—See INSTRUCTIONS, ⁸, ¹²; PRACTICE, ¹², ¹³, ¹⁴, ¹⁵; PRAC. SUP. CT. ²⁷, ²⁸.

DOGS—See CRIM. LAW, ²³.

DOWER—See ESTATES OF DECEDENTS, ¹⁰, ¹¹; HOMESTEADS, ¹¹, ¹², ¹³; NOTES, ³.

DURESS.

1. Duress in the making of a contract exists when the person making it is induced to do so by being put in fear by means of threats of arresting and unlawfully charging him with crime, when the threats and the fear thereby induced are such as would influence a man of reasonable courage and prudence, and deprive the party making the contract of the exercise of free will in making it, provided that the threatened arrest is wrongful and unlawful and apparently about to be enforced.—*Kennedy v. Roberts*, 521.

DURESS Continued

TO

EMINENT DOMAIN

2. **Blackmail**—PLEADING—Code 1873, section 3871, makes it an offense for any person to maliciously threaten to accuse another of a crime with intent to extort any money or pecuniary advantage whatever, or compel the person threatened to do any act against his will. *Held*, that it is not necessary in a suit to recover a note given under duress for the one threatened to plead his innocence of the crime which the other party threatened to accuse him of committing.—*Idem*.
3. **SAME**—An allegation that defendant wantonly and maliciously made the threats for the purpose of extorting the note, and as a result of those threats plaintiff was put in fear and was compelled to execute the note without any consideration, is a sufficient showing that the threats were immediate, and without immediate means of prevention, and were such as would operate upon a person of reasonable courage.—*Idem*.
4. **Ratification**—An intention by the maker of a note obtained by duress, to ratify the same, is necessary in order that any ratification shall be binding upon him.—*Idem*.

ELECTION—See PRACTICE, ¹⁴.ELECTION BY WIDOW—See ESTATES OF DECEDENTS, ¹⁰, ¹¹; HOMESTEADS, ¹¹, ¹², ¹³.

ELECTION OF REMEDIES.

Devise—PARTIAL RENUNCIATION—A stepfather agreed, upon consideration, to convey certain lands to his stepson and devised that land and other to him, by will. *Held*, the stepson could, without being put to an election, claim the land conveyed by contract and also willed, under the contract, and claim the other land under the will. Such a course is not inconsistent, and, therefore, no election is necessary.—*Mills v. McCaustland*, 187.

EMBEZZLEMENT—See CRIM. LAW, ¹, ².EMINENT DOMAIN—See DAMAGES, ¹, ².

1. Poles of an electric railway, if properly placed, do not give ground of complaint to an abutting owner, whether he owns the fee of the street or not.—*Snyder v. Street Railway Co.*, 284.
2. **SAME**—Poles of an electric railway must not be so placed as to interfere unnecessarily with the right of abutting owners to use and enjoy their property.—*Idem*.
3. **School Lands. Presumptions**—Under Code, 1873, section 1827, providing that, in case the owner refuse or neglect to convey land designated for school purposes, the same may be acquired

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EMINENT DOMAIN Continued

TO

EST. OF DECED.

by condemnation in the manner therein provided, a condemnation proceeding in all respects conforming to the strict requirement of such statute raises presumptions that no more than the area of land permitted to be acquired was taken, that the owner withheld his conveyance thereof, that such taking was necessary, and that the requisite tax was voted for its purchase, and all conditions precedent to the exercise of such power were performed.—*District of Oakland v. Hewitt*, 663.

4. **SAME**—Under Code, 1873, section 1825, providing for the taking by condemnation of land “for the location or construction of a school house or for the convenience of the school,” and section 1828, that such land shall be for school purposes only, and if not so used shall revert, an appropriation of land used for a school play ground is for the convenient use of the school, and although not used for an original building site, is not within the latter statute and does not revert.—*Idem*.

EQUITY.

1. **Maxims**—Where the equities are equal, the law will prevail.—*Richards v. Cowles*, 734.
2. **Settlement**—**ADMINISTRATORS**—An allowance made to one acting as administrator under the mistaken idea that he was entitled so to act presents a case in which equity will relieve from mistakes of law.—*Dorris v. Miller*, 564.

EQUITABLE ASSIGNMENT—See **ATTORNEYS**, *.

EQUITABLE LIEN—See **BONA FIDE PUR**, *; **SALES**, *.

ESTATES OF DECEDENTS—See **ATTY'S**, *; **ELECTION OF REMEDIES**; **JUDGMENTS**, *, *, *; **TAXES**, *, *, *.

1. **Executors and Administrators**—**APPOINTMENT**. *Jurisdiction of Courts*.—The county of the residence of the decedent has exclusive jurisdiction to grant letters of administration, under Code, 1873, section 2312, as amended, providing that the district court of each county shall have “exclusive jurisdiction” of the appointment of administrators.—*In re Estate of King*, 820.
2. **SAME**—In proceedings to annual letters of administration granted without jurisdiction, the court has no power to pass on the validity of a settlement made by the administrator. Its powers are confined to annulling the letters issued by it.—*Idem*.

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EST. OF DECED. Continued

8. **SAME**—The district court of the county in which the decedent resided, which, by Code, 1873, section 2312, as amended, has exclusive jurisdiction of the appointment of administrators, may properly ignore a void appointment by the district court of another county, and take any necessary steps to settle the estate.—*Idem*.
4. **SAME—Transfer**—Proceedings for the administration of an estate, commenced in another county than that in which the decedent resided, which latter county, under Code, 1873, section 2312, as amended, has exclusive jurisdiction of such proceedings, should not be transferred to the county of the decedent's residence, as there is nothing to transfer.—*Idem*.
5. **COUNSEL FEES**—Counsel fees of an executor in setting aside and revoking ancillary administration erroneously granted to defendant in another state cannot be recovered from such defendant where no malice on defendant's part is pleaded or proven; and even conceding that defendant had no right to apply for administration, and that his conduct was tortious, the fees are not recoverable. The motive with which a person exercises a legal right is immaterial.—*Dorris v. Miller*, 564.
6. **Fraud**—Counsel fees paid out by one in an unsuccessful attempt to retain ancillary administration of an estate cannot be recovered from the estate, especially where such person made false and untruthful statements in his petition for such administration.—*Idem*.
7. **LIENS—Priorities**—The equitable lien which a judgment creditor establishes upon a devise to the judgment debtor before the executor has taken steps to enforce the payment of notes due from the devisee to the estate, prevails over any interest which the executor may have wherewith to subject the devise to the payment of the notes.—*McCormick v. Hanks*, 639.
8. **TAXATION**—The money in the hands of an executor or administrator is not exempt from taxation for the reason that it is not being loaned or invested, especially where taxes are not paid on same at the principal place of administration.—*Dorris v. Miller*, 564.
9. **SETTLEMENT—Construction of statute**—One appointed as ancillary administrator, in his endeavor to retain such position, was allowed by the probate court counsel fees, under the mistaken idea that he was entitled to represent the estate, and such order has not been set aside or vacated. On appeal, his appointment was reversed. There was no necessity of any ancillary administration, of which he had knowledge, and his acts in petitioning therefor lacked but little, if anything, of

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EST. OF DECED. Continued

fraud. *Held* that, in an action by the estate against him, he was liable for the amount of such fees, under Code, 1873, section 2474, providing that mistakes in settlements may be corrected at any time before the discharge of the executor; and Code, 1873, section 2475, limiting the time to three months within which applications may be made to open up accounts of executors and administrators settled in the absence of parties in interest, has no application to mistakes or fraud in the settlement of an administrator's intermediate account.—*Idem*.

10. Descent and Distribution—DOWER—*Election*—The inference of an election by a widow to retain the homestead for life instead of taking her distributive share under the statute, arising from her occupation of the homestead with her minor children as a home for more than ten years, is overcome by proof of a contrary election solemnly asserted in a suit for contribution instituted by the guardian of the heirs and continually evidenced by leasing and demanding and receiving the rents of the distributive share and bearing its portion of the burden during all such time as to taxes and improvements.—*Wold & Olson v. Berkholtz*, 370.
11. APPLICATION FOR DOWER—*Time for making*—A widow occupying a homestead for more than ten years after her husband's death is not precluded from asserting her right to dower, which she has elected to take in lieu of homestead, by Code of 1873, section 8369, which limits the time within which application for dower may be made to ten years; since the remedy therein provided is not exclusive.—*Idem*.
12. Devisee—Notes executed by a son to his father in 1872 and 1873 which passed to his mother as sole legatee of his father on his death, in 1877, cannot, on the death of his mother, in 1895, in an action to subject his interest as devisee in her estate to a judgment, be considered valid obligations, where no attempt was made by his mother to enforce them during her lifetime, and her executor did not list or treat them as assets of the estate.—*McCormick v. Hanks*, 639.
13. Interest on Funds—An ancillary administrator is not chargeable with interest on the funds held by him where he retained them for less than a year and was not asked to make distribution to the legatees and made no profit therefrom except what incidental profit may have been derived from depositing the funds subject to check in the bank of which he was president.—*Dorris v. Miller*, 564.

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ESTOPPEL

TO

EVID.

ESTOPPEL—See ADJUDICATION; AGENCY, ¹, ²; INSTRUCTIONS, ²; INTOX. LIQUOR, ¹; LIENS, ²; SALES, ⁶.

A statement made by the owner of property indicating its ownership by another is not available to establish an estoppel in favor of one who did not know of such statement at the time he dealt with the property.—*Harward v. Davenport*, 592.

EVIDENCE—See ALIENATING WIFE'S AFFECTIONS, ¹, ², ³, ⁴; ATTACHMENT, ², ³, ⁴; CHECKS, ⁶; CONTRACTS, ²; CRIM. LAW, ³, ⁴, ⁵, ⁷, ⁹, ¹⁰, ¹¹, ¹², ¹⁵, ¹⁶, ²⁰, ²¹, ²², ²⁴, ²⁶, ²⁷, ²⁸, ²⁹, ³⁰; DEED AS MTGE. ², ³; FRAUD, ², ³, ⁴, ⁵, ¹⁶; FRAUD, CONVEY. ⁴; HOMESTEADS, ⁴; JURISDICTION, ²; MARRIAGE, ¹, ²; PRACTICE, ²⁰, ²⁵, ²⁶, ²⁷; PRAC. SUP. CT. ⁸, ²⁰, ²¹, ²³, ²⁶, ²⁸, ²⁹, ³⁰, ³¹, ³², ⁶²; RAILROADS, ², ⁴, ¹⁸; WARRANTY, ¹; WILLS, ³, ⁴.

1. **Account Stated**—*Jury Question*.—It is a question for the jury whether the fact that a debtor retained a bill for services a long time without objection shows such acquiescence as to amount to an account stated, and, if there was, whether the items of the account were correct.—*Hollenbeck v. Ristine*, 488.
2. **Assumption**.—A witness having testified that goods were stolen from his store, it does not assume that a larceny had been committed to ask him what were the goods stolen and to name them.—*State of Iowa v. Marshall*, 88.
3. **Burden of Proof**—See ¹¹, *Post*.—Defendant in an action for board, care, and medicine furnished to his minor son, has the burden of proving the emancipation of his son, where he relies thereon as a defense.—*Kubic v. Zemke*, 269.
4. **Cross-examination**—*Values*—In proceedings to condemn land for railroad purposes, a witness who testifies to its value may be asked on cross-examination the value of other lots in the neighborhood and as to the price paid in one instance, to show his knowledge of values.—*Snouffer v. Railway Co.*, 681.
5. **Declarations of One Deceased**—Where it is not shown that the maker of a note was insolvent, declarations of a deceased payee and indorser that the note had not been paid, and was the property of his wife, made after he had parted with all interest therein, are not competent, as being against his pecuniary interest; and this is so notwithstanding that declarant was still under a contingent liability as indorser of the note.—*Moehn v. Moehn*, 710.

Deeds—See ¹¹ *post*.

6. **Exclusion**—It is proper to overrule an objection to evidence, if admissible for any purpose.—*Citizens National Bank v. Converse*, 669.

EVID. Continued

7. **HARMLESS ERROR**—Error, if any, in sustaining objections to certain questions, is not prejudicial where the evidence sought to be elicited thereby is brought out in answer to other questions.—*Griffith v. Hoag*, 499.
8. **SAME**—Hearsay evidence is not prejudicial where the same fact is subsequently established without contradiction.—*Elwood v. McDill*, 437.
- Fraud**—See 17, *post*.
- Harmless Error**—See 7, *ante*.
9. **Impeachment—Court and Jury**—An instruction as to what weight impeaching evidence shall have as affecting defendant's credibility, and what weight shall be given his testimony, and under what circumstances his testimony may not be rejected entirely, is proper, as such evidence may affect defendant's credibility, and not warrant a rejection of his testimony entirely; and under such circumstances the extent to which his credibility is impeached is for the jury.—*State v. Chingren*, 169.
10. **SAME**—A witness for the state, in a prosecution for larceny, who has testified that defendant wanted to borrow money on the property, cannot be impeached by evidence that he stated to other persons that the property belonged to himself.—*State of Iowa v. Fogarty*, 32.
11. **Innocent Purchaser—Burden of Proof**—The burden of proving that one is an innocent purchaser of real estate without notice of prior equities is originally upon the purchaser, but when he has proved his purchase and payment for the land, the *onus* is shifted to the person asserting the encumbrance, to show notice thereof, either express or implied, to the purchaser.—*Iron Co. v. Iron Co.*, 624.
- Jury Question**—See 1, 2, *ante*.
12. **Medical Books**—Medical works are not admissible under Code, section 4618, making historical works and books of science or art presumptive evidence of facts of general notoriety or interest therein stated.—*Bixby v. Railway and Bridge Co.*, 293.
13. **SAME**—Medical books, although admitted to be standard, cannot be read to the jury for the purpose of proving the symptoms of disease, where they have not been referred to by witnesses whom they are offered to contradict.—*Idem*.
14. **Minutes Before Grand Jury**—The minutes of evidence taken before a grand jury are not competent, as independent evidence, without the testimony of grand jurors, of what a witness testified to before them.—*State of Iowa v. Porter*, 677.

EVID. Continued

15. **Parol Variance**—Evidence as to oral communications by a station agent to a shipper of cattle, prior to the execution of a written contract for their shipment, is inadmissible in the absence of fraud or mistake.—*Burgher v. Railway Co.*, 335.
16. **EXPLANATION**—In an action on a note given for the price of a stallion, where the maker defended on a breach of warranty that the stallion was a reasonably sure foal getter, he was properly permitted to explain his written statement to the seller that the horse was in good condition to mean that he was in good flesh and health; witness not knowing whether he was a foal getter—and the two statements are not contradictory, at all events.—*Elwood v. McDill*, 437.
17. **FRAUD**—In an action for rent and for damages, under a written lease, where it was averred, by way of counter-claim, that lessee was induced to accept the lease in question by false representations of plaintiff respecting the water supply, and was damaged by reason thereof, evidence competent as establishing such fraudulent representations was not objectionable on the ground that a reformation of the lease was not asked and that such evidence tended to contradict a contemporaneous written agreement.—*Sisson v. Kaper*, 599.
18. **RETURN ON EXECUTION**—In an action for the wrongful sale of tax certificates on execution, the officer's return was to the effect that he had "sold certificates * * * to the amount of \$116.30" *Held*, that parol or documentary evidence of the number sold, for which recovery was sought, what they sold for, and their actual value, did not contradict the return, but proved facts with regard to which the return was silent, and was therefore competent.—*Weaver v. Stacey*, 657.
19. **Rebuttal**—The testimony of plaintiff in an action on a promissory note which is in the possession of the maker, to the effect that the defendant obtained the note from her by fraud without paying the same, is not admissible in rebuttal of defendant's testimony that he paid and took up the note, where she rested her case in chief upon evidence that the note was transferred to her by the original payee and that she never transferred it and that the defendant never paid it to her, without offering any evidence to support the allegation of her petition that the defendant obtained the possession of the note by fraud, except as it may be inferred from the statement that he had not paid it to her. Such evidence on her part was essential to her recovery and a part of her main case and she cannot introduce it on rebuttal for the first time, even though it tended, in some degree, to rebut defendant's evidence.—*Moehn v. Moehn*, 710.

EVID. Continued TO EXECUTION SALE

20. **Relevancy**—Evidence was admitted as to the condition of the doors and windows of a burglarized building shortly after the burglary. *Held*, admissible to show the condition of the premises at, or about the time of the burglary.—*The State of Iowa v. Marshall*, 38.
21. **Secondary Evidence—DEEDS—Foundation**—Code, 1873, section 3866, providing that certified copies of the records of deeds are admissible when the original does not belong to the party desiring to use the same or is out of his control, a school district may prove title to land acquired by condemnation by such certified copies of deeds of persons through whom title is derived, when it shows that it did not possess the originals, and did not know where they were, it being in such case not presumed that the owner should have possession of such muniments of title; and this, though evidence is elicited on cross-examination tending to show that by diligent search the party might have known where the originals were, and perhaps, by *subpoena duces tecum*, could have produced them.—*District of Oakland v. Hewitt*, 663.
22. **Statute of Frauds**—An agreement, between the holder of a certificate of deposit and the cashier of a bank, that such holder could check against the amount of the certificate, cannot be objected to by the payee of a check so drawn, if by any one on the ground that such agreement is within the statute of frauds.—*Hamlin v. Simpson*, 125.
23. **Successive Trials**—Evidence given on one trial is inadmissible on a second trial in the absence of any explanation for the failure to call the witnesses who gave the same.—*Savings Bank v. Colby*, 424.

EXECUTION—See, JUDGMENT², LEVY.

EXECUTION SALE—See, ASSIGNMENT, BONA-FIDE PURCH.¹; REDEMPTION,¹,².

Redemption—Affidavit—Code, 1873, section 3117, relating to redemptions by creditors from execution sale after nine months, requires that "such redemptioners" shall enter certain credits on the record. Section 3118 requires that the person "so redeeming" shall file an affidavit setting forth the amount due and unpaid on his own claim. *Held* that, since sections 3101-3117 relate in their former portion to redemptions before nine months from execution sale, and in their latter part relate to redemptions subsequent thereto, the words "such redemptioners" and "so redeeming" must apply to the latter, and

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EXECUTION SALE Continued **TO** **FRAUD**

intend that affidavit shall be necessary only when redemption is made after nine months.—*Fry v. Warfield*, 559.

EXECUTORS—See **ESTATES OF DECEDENTS**, 1, 2, 3, 4, 5, 6, 7, 9, 13; **JUDGMENTS**, 2.

EXEMPTIONS—See **HOMESTEADS**, 5, 11, 13.

FALSE PRETENSES—See **CRIM. LAW**, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19; **PRAC. SUP. CT.** 37, 45.

FAMILIES—See **CONTRACTS**, 10, 11.

FINAL JUDGMENT—See **PRAC. SUP. CT.** 16.

FINES.

An order by the governor suspending the further execution of a specified judgment for maintaining a liquor nuisance because it is represented that the defendant's health is in such a condition that further confinement will endanger his life, does not operate as a remission of the fine imposed on defendant, although it will prevent, during such suspension, the maintenance of an action under Code, 1873, section 1558, to subject the real estate to the payment of the judgment for the amount of such fine.—*State v. Mateer*, 66.

FORECLOSURE—See **MTGES.**, 4, 5.

FORFEITURE—See **INSURANCE**, 7, 8, 9.

FORUM—See **PRACT. SUP. CT.**, 48.

FRAUD—See **ESTATES OF DECEDENTS**, 6; **EVIDENCE**, 17; **MTGES.**, 8; **INSURANCE**, 11; **PRACTICE**, 20.

1. Fraud in procuring mortgages cannot be predicated upon the acceptance by creditors of mortgages made and delivered by their debtor, an insolvent, in pursuance of a previous agreement that he would execute the same if he should be unable to meet their claims in accordance with terms then agreed upon, and which he was unable to fulfill.—*Groetzinger v. Wyman*, 574.
2. Evidence—See 15, *post*—A dealer knew that false ratings were given him by commercial agencies, and made false representations himself concerning his solvency, and bought in small lots, on time, from sixty-three wholesalers to an amount greatly in excess of the demands of his trade and his ability to pay. He duplicated goods on hand, and bought unseasonable goods, and urged prompt delivery. *Held*, that these facts prove an intention of cheating the sellers out of the purchase price.—*Cox Shoe Co. v. Adams*, 402.

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FRAUD Continued

8. **SIMILAR FRAUDS**—In action to rescind a contract on the ground of fraudulent misrepresentations, it is not necessary to allege conspiracy in order to introduce evidence of similar transactions at or about the same time, each transaction being charged to be one of a series of fraudulent purchases made with secret intent not to pay, and through false representations.—*Idem*.
4. **INSOLVENCY**—Evidence that a dealer has a stock of goods worth fifteen thousand dollars, and at the same time owes twenty-three thousand dollars, and conceals his condition from commercial agencies, fully establishes insolvency.—*Idem*.
5. **RELIANCE**.—That a judgment debtor looks at the judgment record and sees that no assignment of the judgment to one who falsely represents to be the owner has been filed, is not conclusive that he was not justified in relying upon such representations in giving the note for the amount of the judgment.—*Goring v. Fitzgerald*, 507.
6. **False Representations**.—A sale of goods to a vendee, who falsely represents himself either to the vendor or a commercial agency, to be solvent, knowing himself to be insolvent, which sale is made in reliance upon those representations, can be rescinded, although the sale was not made for a year after the representations were made.—*Cox Shoe Company v. Adams*, 402.
7. **TO COMMERCIAL AGENCY**—Where a commercial agency gives a dealer a rating which is false, but is not based upon any statement of the dealer, a sale made to him on the strength of that rating can be rescinded, if he referred the vendor to that rating with approval, but not otherwise.—*Idem*.
8. **SAME**—The information gathered by a commercial agency for a particular line of trade is presumed to be for the benefit of those in that line of business, and it is presumed that a vendor in that line rightly uses its reports, and one who makes a statement of his financial condition to an agency does so with the intent that it will be communicated to such of its patrons as may inquire.—*Idem*.
9. **Injury By**—A judgment debtor who is induced to give a note for the amount of the judgment to one who falsely represents himself to be the owner of the judgment, which note he subsequently pays, may recover from the one making the representation the amount so paid, although he had not yet been compelled by the rightful owner of the judgment to pay the same.—*Goring v. Fitzgerald*, 507.

FRAUD Continued

TO

FRAUD. CONVEY.

10. **Principal and Surety**—FRAUD OF OBLIGEE—Where the surety inquires of the creditor respecting the principal for information the creditor may properly give, and the creditor withholds the same without sufficient cause, or misleads the surety, the creditor should suffer the loss thereby occasioned.—*Savings Bank v. Boddicker*, 548.
11. **Rescission**—A sale of goods to a purchaser, who has a secret intention of not paying for them, may be rescinded.—*Cox Shoe Co. v. Adams*, 402.
12. **SAME**—Where the owner of a patent right exhibited a model and stated that the patent which he owns covers the machine exhibited, and, on the strength of the representation, sells the right to manufacture it, he may be enjoined from selling the notes given for that right, and the notes may be declared null and void, if an important device shown in the model is covered by another patent, and the purchaser cannot, for that reason, manufacture, under the right, the machine shown him.—*Moyle v. Silbaugh*, 531.
13. **OFFER TO RETURN**—An offer to return securities given as a part of a transaction is not a necessary pre-requisite to an *action for damages* for falsely representing himself to a judgment debtor to be the owner of the judgment.—*Goring v. Fitzgerald*, 507.
14. **POSSESSION BY MORTGAGEE**—Where a vendor is induced to sell goods by fraudulent representations of the vendee concerning his solvency, which goods are thereafter mortgaged for an antecedent debt, and the vendor elects to rescind the sale, the possession of the goods by the mortgagee will not defeat the claims of the vendor.—*Cox Shoe Co. v. Adams*, 402.
15. **Scienter—EVIDENCE**—Evidence that a lawyer stated to a judgment creditor that he owned the judgment when he had no title thereto, in reliance upon which the debtor gave him a note for the amount thereof, is sufficient proof, in the first instance, of his guilty knowledge of the falsity of the statement.—*Goring v. Fitzgerald*, 507.

FRAUDULENT CONVEYANCES—See PRACTICE, " "; PLEADING, '.

1. **Advancements as Consideration**—An agreement by a child to repay a father an amount advanced by the latter not as a gift but as an advancement is valid.—*Banning v. Purinton*, 642.
2. **Evidence**—The extent of the grantor's property, and amount of indebtedness, and the nature of his trouble with plaintiff

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FRAUD. CONVEY. Continued

at the time of the alleged fraudulent conveyance, were not shown. The conveyance, though to grantor's father-in-law, was based on a consideration, part of which went to pay a debt due grantor's wife, part was a note of the wife, and part the price of a lot conveyed by the grantee to the wife. *Held*, to be insufficient to show fraud.—*Idem*.

3. **BURDEN OF PROOF.**—One who acts as confidential agent or banker for his father must be able to show on a creditor's bill to subject to the payment of a judgment against the father's property of the son claimed to have been purchased with money belonging to the father, that he has accounted for all that he received from the father, where he collected a large amount for him and kept no account of the same.—*Hunt v. Johnston*, 311.
4. **FATHER AND CHILD.**—One who was insolvent, during the time of his indebtedness to plaintiff, conveyed to his son a quarter section of land and some town lots, and the son paid certain debts of the father in consideration therefor. The father had at one time considerable property and the son had nothing; and subsequently the son had considerable property and the father had nothing, without sufficient income belonging to the son, or losses upon part of the father, to account for the change. The son denied, upon being assessed, that he was possessed of money or credits, and acted as financial agent of the father, and collected money belonging to the father, without sufficiently accounting for it. *Held*, that the circumstances justify a finding that the conveyance was made to hinder, delay and defraud the creditors of the father.—*Idem*.
5. **Insolvency**—To entitle a creditor to set aside a conveyance by a debtor as fraudulent he must establish the insolvency of the debtor.—*Banning v. Purinton*, 642.
6. **SAME**—It is not essential to the right of a creditor to attack a mortgage executed by the debtor, as fraudulent, that the debtor shall have been insolvent at or about the time of the execution of the mortgage if he was insolvent at the time the attack was made upon the conveyance, though the fact of his insolvency at the time of the execution of the mortgage may be relevant to the question of fraud.—*Idem*.
7. **Secret Reservations**—A conveyance of land for a full and adequate consideration will not be set aside as fraudulent to the grantor's creditors because the grantees agreed orally that the grantor should have certain growing crops to feed some

FRAUD. CONVEY. Continued

TO

GENERAL ASSIGNMENT

cattle belonging to him which were not conveyed, where such crops had been previously mortgaged, part of them were raised by others under contract by which they were to receive a specific price per bushel for their labor, and another part was grown under a lease by which the grantor was to have only one-third of the crops as rental, and all reservation, so far as it was secret, was for the benefit of the grantor's creditors — *Eddy v. Wearin*, 387.

8. SAME—A conveyance of land will not be set aside as fraudulent to the grantor's creditors because of an independent agreement not in consideration of the deed, by the grantees, for a life lease of the land to the grantor, which agreement was never carried out.—*Idem*.

GARNISHMENT—See HOMESTEADS, ¹³; LEVY; MARSHALING ASSETS, ¹, ²; SUBROGATION.

CREDIT ON JUDGMENT—The principal debtor is entitled to a credit on a judgment against him, of an amount admitted by a garnishee to be due, where it does not appear that the garnishee was ever released, and the principal debtor denies having received the amount of such indebtedness, although no case was ever docketed against the garnishee and no judgment rendered, and though it does not appear that he ever paid the amount of such indebtedness to the garnishing creditor.—*Doughty v. Meek*, 16.

GENERAL ASSIGNMENT.

1. MORTGAGES—The intention of a chattel mortgagor, not known to the mortgagee, formed before the execution of the mortgage, to make a general assignment for creditors, which was carried out after the execution of the mortgage, does not render the mortgage a part of the assignment under the statutes by virtue of which both the mortgage and general assignment would be void if the mortgage was treated as a part of the assignment.—*Groetzinger v. Wyman*, 574.
2. SAME—A chattel mortgage upon an entire stock of goods and the book accounts of the business does not constitute a general assignment, although the possession is given to an agent of the mortgagee, where such possession is conditional and the mortgagor retains the *jus disponendi* upon payment of the debts secured, which do not apparently exceed two-thirds of the value of the property mortgaged.—*Idem*.

GOVERNOR OF STATE—See COSTS; FINES.

GRAND JURY—See CRIM. LAW, ¹⁹, ²⁰, ²¹; EVIDENCE, ¹⁴.

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GUARANTY

TO

HOMESTEAD

GUARANTY

ABSOLUTE LIABILITY—One who was not a party to a note signed the guaranty written on the back of the note: "I guaranty payment. Demand, notice and notice of protest waived." *Held*, that the guaranty was absolute, and the guarantor could not plead want of notice and demand, and lack of diligence on the part of the payee in collecting from the payer, as a defense.—*Hoyt v. Quint*, 443.

HABEAS CORPUS—See **PAC. SUP. CT.** 52, 53, 54.

HARMLESS ERROR—See **ALIENATING OF WIFE'S AFFECTIONS**, 1; **CRIMINAL LAW**, 6, 6; **EVIDENCE**, 7, 8; **INSTRUCTIONS**, 6, 6, 7, 8, 8; **INSURANCE**, 12; **PLEADING**, 9, 10; **PRACTICE**, 26; **PAC. SUP. CT.** 20, 21, 22, 24, 26, 27; **REPLEVIN**, 1.

HEIRS—See **ATTYS.** 2.

HIGHWAYS—See **INJUNCTION; PAC. SUP. CT.** 48.

Injunction—VACATION—Remedy of abutting owner—An owner abutting on a highway, which a town proposes to vacate, no part of a highway lying on his land, cannot enjoin the vacation on the claim that his right of access will be interfered with and he otherwise seriously injured, as he has a plain, speedy, adequate remedy at law by *certiorari*. No question of fraud or bad faith is involved, and the right to damages is not decided. *McLachlan v. Town of Gray*, 259.

HOMESTEAD.

1. **Abandonment—Pleading**—Plaintiff, occupying a dwelling house with his wife which they had moved from their homestead to their son's land sixteen months previously, sued to enjoin a sale of their land under execution, and alleged that they moved because they needed their sons care, "by reason of their age, sickness and infirmities," and that the removal was temporary and without any intent to permanently separate the house from the land, or of abandoning their homestead or homestead rights. *Held*, that the petition was insufficient, as it failed to show a definite purpose to resume their residence on the land.—*Maguire v. Hanson*, 215.
2. **Dwelling—REMOVAL OF**—The fact that the dwelling house, after removal from land previously used as a homestead, remains exempt as a homestead does not continue the homestead character of the land from which it has been removed.—*Idem*.
3. **SAME**—A removal of the dwelling house from a homestead for a temporary cause, with the intention on the part of the owner

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HOMESTEAD Continued

to replace it on the land and resume his residence therein, does not prevent an abandonment of his homestead right in the land, where he subsequently abandons such original intention.—*Idem*.

4. **Evidence**—The removal of a dwelling house from land and its occupation as a home in its new location are *prima facie* evidence of abandonment and plaintiff who asserts homestead rights, must rebut this presumption which arises from these facts.—*Idem*.
5. **Exemptions**—See "1, 14, *post*—The homestead character attaches to a lot purchased for a homestead from the time the purchaser disposes of his former homestead using the proceeds thereof to pay for the new homestead although at that time there was no house upon the lot, but the exemption from debts accruing prior to such occupation is limited to the extent of the value of the old homestead under Code, 1873, section 2000, authorizing the owner to change the limits of the homestead or to "change it entirely" with the concurrence of the husband or wife, and section 2001, exempting the new homestead to the extent in value of the old from execution in all cases where the old homestead would have been exempt; and the homestead may be sold subject to such exemption if it appear that the debtor's other property has been exhausted in satisfaction of the debt.—*Blue v. Heilprin*, 608.
6. **Husband and Wife**—A conveyance of a homestead by both husband and wife by a deed, absolute on its face, but intended only to secure a debt, does not destroy the homestead character of the land conveyed, and the wife cannot be deprived of her homestead right therein by a subsequent release of his right to redeem,"executed by the husband alone.—*Haggerty v. Brower*, 395.
7. **EVIDENCE**—A wife, unable to read or write, ignorant of her rights, and acting under a belief that the grantee in a deed given to secure a debt, had absolute right to her property, and not knowing that her husband had accepted a lease from him, asked him to build a new house on the land. *Held*, not to preclude her from setting up a claim of homestead.—*Idem*.
8. **Occupancy**—Plaintiff purchased a lot, and began the erection thereon of a house, for his home. The homestead then occupied by him was then sold, and during the building of the new house he resided in a rented one. Some articles were removed to a shed on the new premises, and plaintiff cultivated a garden there, but the greater part of the household goods were moved into the rented house. On completion, the family moved into

HOMESTEADS Continued

TO

INJUNCTION

the new house, and used it as a homestead. *Held*, that the homestead character attached only from actual occupancy of the premises.—*Blue v. Heilprin*, 608.

9. **SAME**—It is not sufficient that a homestead claimant is supported by cultivation and use of the property claimed as a homestead. The actual occupation of the premises as a home for the owner and his family is required, except in a few exceptional cases of temporary absence.—*Maguire v. Hanson*, 315.
10. **CHANGE**—Independently of a change a homestead right will not attach as contemplated by Code, 1873, section 2000, to a lot purchased for a homestead until the occupation of the house erected thereon although prior to the time the owner had commenced the construction of a house to replace that removed from the lot when he purchased it, and had sold his former homestead.—*Blue v. Heilprin*, 608.
11. **WIDOWS—DEBTS OF**—Where a widow divests her homestead right by taking her distributive share in her husband's estate, it subjects such homestead to her debts contracted before that time.—*Askwith v. Doerscher*, 391.
12. **DEVESTMENT**—The taking by a widow of her distributive share in her husband's estate divests the homestead right under Code, 1873, sections 2007, 2008.—*Idem*.
13. **INSURANCE—Garnishment**—The proceeds of an insurance policy on a homestead are not exempt from garnishment in case of a widow who had elected to take her distributive share instead of her homestead right, under the statute.—*Idem*.

HUSBAND AND WIFE—See **ALIENATING WIFE'S AFFECTIONS**, 1, 2, 4; **COMPOUNDING FELONY**, 1; **CONTRACTS**, 2, 7; **MARRIAGE**, 1, 2; **NOTES**, 2.

IMPEACHMENT—See **EVIDENCE**, 9, 10.

INCUMBRANCES—See **DEEDS**; **INSURANCE**, 1; **MECHANIC'S LIENS**, 2, 3; **MTGES.**, 3.

INDICTMENT—See **CRIM. LAW**, 1, 2, 13, 14, 15, 16, 17, 19, 20, 21, 25, 22; **PRACTICE**, 26; **PRACT. SUP. CT.**, 45.

INDORSEMENT—See **CHECKS**, 1; **NOTES**, 1, 2; **EVID.**, 5.

JUDGMENT—See **JUDGMENTS**, 5; **PRACTICE**, 26.

INHERITANCE—See **TAXES**, 1, 2, 3.

INJUNCTION—See **CO-TENANCY**, 1; **HIGHWAYS**; **MUNICIPAL CORP.**, 2; **PRACTICE**, 21, 22.

Railways—Highways—A mandatory injunction to compel the removal of an electric light pole may be granted when the pole is placed in front of the plaintiff's property without

INJUNCTION Continued

TO

INSTRUCTIONS

necessity therefor, for the purpose of annoying him and to injure and depreciate the value of his property, and where its placing causes serious injury.—*Snyder v. Street Railway Co.*, 264.

INSANITY—See JURISDICTION, 1; CONTRACTS 3, 4.

INSOLVENCY—See FRAUD, 4; FRAUD. CONVEY., 4, 6.

INSTRUCTIONS—See ALIENATING WIFE'S AFFEC. 4; CRIM. LAW, 21; DAMAGES, 2; NOTES, 2; PRACTICE, 20, 22; PRACTICE SUP. CT., 24, 26, 27; RAILROADS, 4, 1, 11; WARRANTY, 2.

1. **CONSTRUED**—An instruction that defendant was to be allowed credit only for the debt due to him from plaintiff, and for attachment claims of other persons against plaintiff paid by defendant is not ground for reversal although he paid another debt of plaintiff, where the jury were told in another instruction to allow defendant credit for all money paid by him in accordance with the agreement between him and plaintiff, and there is a dispute as to whether he was authorized to pay anything except attachment claims.—*Boyce v. Allen*, 249.
2. **SAME**—An instruction to find an estoppel if the plaintiff "knowingly and wantonly suffered and permitted" certain facts to be held out is not misleading as given, though the word "wantonly" alone would require too great a culpability.—*Harward v. Davenport*, 592.
3. **ORDINARY CARE DEFINED**—An instruction that there is no absolute test in determining what is ordinary care but it may be considered to be that degree of care which an ordinarily reasonable man would exercise under like circumstances, in view of all the facts existing at the time, is not misleading because of the apparent conflict between its different parts, and such an instruction states the law with substantial accuracy.—*Graham v. Town of Oxford*, 705.
4. **FAILURE TO GIVE**—Where a defense is stated in a very obscure manner, and no request is made for an instruction upon that point, it is not error for the court to overlook it in giving its instructions.—*Kennedy v. Roberts*, 521.
5. **HARMLESS ERROR**—It is not prejudicial error for the court to read to the jury a pleading in the action which there is no evidence to support where the court later in its charge called the jury's attention specially to the issues which had support in the testimony.—*Frank v. Davenport*, 588.
6. **SAME**—Any faults in an instruction concerning the consideration of a note in question are cured by a special verdict of the jury

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- that the note was founded upon a valuable consideration.—*Kennedy v. Roberts*, 521.
7. **SAME**—An instruction that fraud might be proved by circumstances from which the inference of fraud is *irresistible* is harmless, where it is so qualified by succeeding instructions that the party seeking to prove fraud could not be prejudiced.—*Seiler v. Life Association*, 87.
 8. **SAME**—Error in giving instructions, or refusing the defendant the opening and closing, is harmless where the case might have been taken from the jury.—*Idem*.
 9. **ADDITIONAL CHARGE**—*Curing Error*—Possible error in instructions, on account of their being misleading, may be cured by further instructions given to the jury, on their request, after retirement, which correct any wrong impressions to be obtained from the original ones.—*Citizens National Bank v. Converse*, 669.
 10. **Requests**—Requested instructions are properly refused when included in those given.—*State of Iowa v. Fogarty*, 32.
 11. **SAME**—An instruction is properly refused where substantially the same thought has been expressed in the charge given.—*Childs v. Muckler*, 279.
 12. **Verdict**—Under a charge that plaintiff in replevin must prove "absolute" ownership of the property, a verdict in his favor on evidence of ownership subject to a chattel mortgage is not contrary to the instructions, where, though inaccurate, the word "absolute" was not so used as to mislead the jury.—*Harward v. Davenport*, 592.

INSURANCE—See **HOMESTEADS**, 12; **INSTRUC.**, 7, 8; **PRAC. SUP. CT.** 29.

- 1 **Assessments**—*Judgment for Fixed Sum*—A judgment at law may be rendered for the fixed amount provided by a certificate of accident insurance notwithstanding a provision that the indemnity shall not exceed the amount to be realized from one quarterly assessment from the members of the association at the date of the accident, if it appears from other provisions that such assessment though limiting the amount of the indemnity does not furnish the sole source of the payment; and it is incumbent upon the association to plead and show the fact that an assessment would not produce such amount if it seeks to reduce the recovery on that ground and it is not necessary for the insured, in the first instance, to compel the association to make an assessment even though it shows that it has no funds in its possession with which to pay the amount due.—*Hart v. Accident Association*, 717.

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2. **Copy of Application**—The attachment to an insurance policy of a copy of the application, followed by the word "signed," but without the signature of the applicant, does not entitle the company to rely on any part of such application, under Acts Eighteenth General Assembly, chapter 211, section 2, providing that all insurance companies shall on the issue of any policy attach thereto "a true copy" of any application and that if it neglects to do so it shall be forever precluded from pleading, alleging or proving such application or any part thereof. *Seiler v. Life Association*, 87.
3. **SAME**—Under McClain's Code, section 1733, providing that a true copy of any application or representation of the insured which is referred to in the policy shall be indorsed thereon, or attached thereto, otherwise the insurer shall be precluded from pleading it or the falsity thereof, such copy need not be a *fac simile*, but must be so exact that on comparison it may be said to be a true copy, without resorting to construction.—*Johnson v. Des Moines Insurance Company*, 273.
4. **Rule applied**—The substitution in a purported copy of an application for life insurance, of "children" for "mother," as a term of relationship, the omission of a question as to the amount of other insurance in the same company, the consolidation of several questions into one, the setting out of answers to questions not given in the original and the insertion of questions as to the details of general questions in the original, are such variations as to require construction; and hence it is not a true copy, within McClain's Code, section 1733, requiring true copies of such applications to be endorsed or attached to a policy of which they are a part.—*Idem*.
5. **Report of Medical Examiner**—A special report of a medical examiner is not a part of the "application or representation of the assured," within McClain's Code, section 1733, requiring such to be endorsed on or attached to a life insurance policy, of which it is made a part.—*Idem*.
6. **Contract Construed**—The weekly indemnity for loss of time and the indemnity for loss of a foot provided in a certificate of accident insurance may both be recovered, although they result from the same accident, if the total indemnity does not exceed the limit fixed by the terms of the contract.—*Hart v. Accident Association*, 717.
7. **Forfeiture—INCUMBRANCE**—Under a provision in a fire insurance policy that if the property is incumbered it must be so represented to the company, and expressed in the policy in

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Ins. Continued

- writing, or the contract shall be void, the failure to inform the insurers of the existence of a mortgage renders the policy void.—*Baldwin v. Insurance Co.*, 379.
8. **SUICIDE**—Where a life insurance policy contains no stipulation as to suicide and is taken out in good faith, it is not avoided, as against a *beneficiary* named therein, by the fact that assured while sane, purposely took his own life.—*Seiler v. Life Association*, 87.
 9. **VACANCY**—A provision in a fire insurance policy that the policy should be void and inoperative during the time the premises remain vacant, without the assent of the insurers, is valid, and during such time the policy is rendered void.—*Baldwin v. Insurance Co.*, 379.
 10. **Revival of Policy**—Where a fire insurance policy is rendered void by reason of a violation of its provisions, it is not revived by attaching thereto an agreement for the benefit of the mortgagee, without a new consideration therefor.—*Idem*.
 11. **Fraud — MISREPRESENTATION OF CALLING — Knowledge of Insurer**—A certificate in an accident insurance association is valid and will take effect according to its terms notwithstanding that the insured was engaged in a more hazardous employment than those included in the class in which he was insured where the certificate was issued with knowledge by the insurer of the character of the insured's employment, but with the understanding that he was to change his occupation, and the insured had abandoned the more dangerous occupation before the accident, although he had not commenced the new employment.—*Hart v. Accident Association*, 717.
 12. **Harmless Error—Pleading**—Error in permitting plaintiff in an action on a policy of accident insurance to testify that he had read the certificate and the articles of incorporation and by-laws of the association and had complied with all of them is not prejudicial where the averment in his petition that he had complied with all the conditions precedent was not sufficiently denied in the answer.—*Idem*.
 13. **Notice—Pleading**—The sufficiency of the notice given to an accident insurance association in compliance with a by-law was not put in issue in an action upon the insurance certificate, tried while Code, 1873, section 2715, was in force, by a general denial of the petition which averred that the plaintiff had complied with all the conditions and provisions of the articles and by-laws to be kept and performed by him, and in view of the provision of that section that in pleading the performance of

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INTOX. LIQUORS

conditions precedent in a contract, it is not necessary to state the facts constituting such performance, but the party may state generally that he has duly performed all the conditions on his part, and section 2717, providing that if either of the allegations contemplated in the three preceding sections is controverted, it shall not be sufficient to do so in terms contradictory of the allegations, but the facts relied on shall be specifically stated,—*Idem*.

INTEREST—See ESTATE OF DECEDENTS, 12; MTGES. 4, 5.

A note with a specified amount, with interest, given for the purchase price of a horse under a contract providing for the return of the horse if not as warranted, and for the taking of another horse in lieu of him, with a credit on the note on account of the exchange, bears interest from its date instead of from the date of the exchange made in accordance with the contract.—*Elwood v. McDill*, 437.

INTERVENTION—See MARSHALLING ASSETS, 2.

INTOXICATING LIQUORS—See COSTS; FINES.

1. **Estoppel**—Delay in prosecuting an action to subject the premises wherein liquors were sold in violation of the law to the payment of the fines and costs, will not estop the state from obtaining the relief demanded, where the property changed hands several times during the pendency of the action, and the state was unable to obtain service of process on the owners.—*State v. Mateer*, 66.
2. **Lis Pendens**—A purchaser of land during the pendency of an action to subject it to a judgment rendered on account of a liquor nuisance cannot claim protection as a purchaser in good faith without any actual knowledge of the pendency of the action where all the requirements of the statute for giving constructive notice of the rights of the state have been met, under Code, 1873, section 2628, providing that when a petition has been filed affecting real estate, the action is pending so as to charge third persons with notice of its pendency, and during such pendency no rights can be acquired by third persons.—*Idem*.
8. **SAME**—The filing of a petition in an action by the state to subject the premises wherein liquors were sold in violation of law to the payment of the fine and costs incurred by the seller, which alleged that the judgment was rendered on account of unlawful sales carried on on the premises, that defendants

INTOX. LIQUORS Continued

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JUDG.

claimed to own or have an interest therein, and which requests a lien, is sufficient to apprise third persons of the rights of the state and of the relief demanded.—*Idem*.

4. **Nuisance—LIMITATION OF ACTION—*Statute Penalty***—An action under Code, 1873, section 1558, as amended, to subject real estate to a judgment rendered on account of a liquor nuisance, is not, within section 2529, providing that actions "for a statutory penalty" cannot be brought after two years from the time the cause of action accrues.—*Idem*.
5. **NOTICE TO OWNER**—Under Code, 1873, section 1558, as amended by Acts Twenty-first General Assembly, chapter 66, section 13, providing that the premises used for illegal sale of liquors with the knowledge of the owner thereof shall be liable for all fines, costs, and judgments incurred thereby, one who owned a building for two months immediately preceding the finding of the indictment, during which time intoxicating liquors were kept and sold therein, is charged with knowledge of the use it was put to.—*Idem*.
6. **PARTIES**—The owners of property on which a liquor nuisance is maintained, who have sold the same, are not necessary parties to an action under Code, 1873, section 1558, as amended, to subject such property to a judgment rendered on account of keeping such nuisance, as the demand for relief is against the property instead of such former owners.—*Idem*.

JUDGE—See CRIM, LAW, 4.

JUDGMENTS—See ADJUDICATION; CO-TENANCY, 2; INSURANCE, 1; JURISDICTION, 2; LIMITATIONS OF ACTIONS, 2; NOTES, 2; PARTITION; PLEA AND PROOF, 11; PRACTICE, 10, 11; REPLEVIN, 2.

1. **Assignment**—The assignee of a judgment acquires no rights which were not possessed by his assignor.—*Boggs v. Douglass*, 344.
2. **Collateral Attack—*Notice by Publication***—A mortgagee cannot attack a decree foreclosing a mechanic's lien on the mortgaged premises, rendered upon his default after publication of notice in an action to foreclose the mortgage, but his remedy is by a motion for retrial under Code, 1873, section 2677.—*Loan Assn. v. McIntosh*, 697.
3. **SAME**—The appointment of an administrator by the district court of another county than that in which decedent resided, in violation of Code, 1873, section 2312, as amended, may be collaterally attacked where the petition for letters recites that the decedent resided in another county, thus showing the want of jurisdiction on its face.—*In re Estate of King*, 320.

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JUDGMENT. Continued

4. **SAME**—A judgment awarding an execution against certain real estate belonging to a decedent's estate is conclusive as against the heirs who were parties thereto, that all the necessary parties were before the court, although they did not lead a defect of parties, and they cannot collaterally attack the judgment upon the ground that certain other heirs were not served.—Fulliam v. Drake, 615.
5. **Infants—Jurisdiction**—A justice's judgment in an action by a minor in his own name, although it may be erroneous is not void under Code, 1878, section 2565, providing that the action of a minor "must be brought by his guardian or next friend."—Parkins v. Alexander, 74.
6. **Nunc pro tunc**—The entry of a judgment *nunc pro tunc* is not authorized, merely, because the party had the right to a judgment at the time as of which the judgment is entered, but there must have been an actual rendition of a judgment.—Doughty v. Meek, 16.
7. **SAME**—The filing with the clerk of a statement of commission of judgment is a sufficient rendition of judgment to authorize the subsequent entry of judgment *nunc pro tunc*.—*Idem*.
8. **EXECUTION**—An execution issued on a judgment which has never been formally entered is supported by an entry thereof *nunc pro tunc*—*Idem*.
9. **Res Adjudicata**—A judgment against the maker of a note given for the purchase price of fruit trees, in an action by an assignee of a note in which the defense that such an assignee was not an innocent holder is set up as well as a claim that the seller of the trees to whom the note was made payable broke his agreement to set the trees, care for them for four years and replace all that die during such time, is not conclusive in a subsequent action by the purchaser against the seller for breach of such contract.—Griffith v. Fields & Bryant, 362.
10. **Vacation**—Defendant in an action on a judgment of another state, against whom judgment by default is rendered, is not entitled to have the default set aside on the mere defense of *null tiel* record, under Code, 1878, section 3159, providing that the judgment shall not be vacated until it is adjudicated that there is a "valid defense" to the action. It must be shown that petitioner was not indebted to judgment plaintiff.—Bank of Stratton v. Dixon, 148.
11. **OPENING—Law and Equity**—A judgment is conclusive as against parties thereto unless grounds exist for a new trial or for equitable interference—Fulliam v. Drake, 615.

JUDGM. Continued

TO

JURISDICTION

12. *Review in Equity*—Questions which have been adjudicated in a court of law having jurisdiction of the subject matter and the parties cannot be reviewed by the defeated parties by a suit in equity, since under Code 1873, section 2532, and also independent of statute, equity has no power to review or correct errors in a proceeding at law.—*Idem*.
13. **PARTIES**—A demurrer to a petition for a retrial to vacate an order under Code, 1873, section 3092, awarding an execution against certain real estate belonging to decedent's estate is properly sustained where some of the parties to the original proceeding are not parties to the application to vacate.—*Idem*.

JUDGMENT ON PLEADINGS—See PRACT. SUP. CT., 9.

JURISDICTION—See COURTS; ESTATES OF DECEDENTS, 1, 2, 3; JUDGMENTS, 2, 4; PRACTICE, 20.

1. **COURTS—CRIMINAL PRACTICE—Insanity**—The district court has jurisdiction to try the question of sanity of a person indicted for murder and order him to be confined in the insane department of the penitentiary, although an application by his father had been handed to the clerk of such court before the indictment was found, stating that he was insane, and asking that the commissioners of insanity investigate and take action in the case, where no action was taken by such commissioners until after the finding of the indictment and service of warrant—under Code, section 2379, providing that on a written application by any citizen stating that a person confined within any prison, within the county, charged with a crime, but not convicted thereof, nor on trial therefor, is insane, the commissioners shall cause such prisoner to be brought before them and direct his removal to one of the hospitals for the insane, if they find him to be insane, section 5540, providing, that if a defendant appears, in any stage of the trial of a criminal prosecution, and a reasonable doubt exists as to his sanity, further proceedings must be suspended and a trial had on that question, and section 225, providing, that the district court shall have "exclusive" jurisdiction of all criminal actions, except in cases where exclusive or concurrent jurisdiction is, or may, thereafter be conferred upon some other "court or tribunal."—*Stone v. Conrad*, 21.
2. **SUMMONS**—Where the statutes of a foreign state do not in terms require that the summons shall state the time and place to answer, and the summons in question did not furnish such information, a judgment rendered on default of defendant's appearance presupposes that such summons was sufficient

JURISDICTION Continued TO LAND AND TEN,

under the laws of such state, and the judgment will not be deemed void for want of jurisdiction.—*Green v. Life Association*, 628.

3. **EVIDENCE—Judgment**—The rule that a court of a general jurisdiction will be presumed to have jurisdiction for the purposes of the judgment which it renders does not apply to a judgment of a foreign corporation which did not appear in the action, unless it is shown that it submitted itself to the jurisdiction of the courts of the state.—*Idem*.

JURY—See PRACTICE, ¹.

JURY QUESTION—See CRIM. LAW, ^{7, 8}; EVID., ^{1, 2}; LIBEL, ⁴; RAILROADS, ^{11, 12}; SIDEWALKS, ^{1, 2, 3}.

JUSTIFICATION—See LIBEL, ^{3, 4}.

LACHES—See INTOX. LIQUOR, ¹.

LANDLORD AND TENANT.—See CONTRACTS, ¹; LIENS, ^{1, 2}.

1. **Contract—Construction**—An agreement to pay a specified rent yearly for a piano, besides “keeping it in tune,” does not render the lessee liable for the expense of cleaning and tuning it when it is first received by him. It is an agreement to keep in tune and not to put in tune.—*Barnhart v. Hanford*, 116.
2. **Lease—Life Tenant**—The lessee of land from a life tenant has no further right of occupation where the lessor dies when there are no growing crops.—*Carman v. Mosier*, 367.
3. **TERMINATION BY MORTGAGE**—A mortgage of a piano to the lessee thereof, given during the year for which rent had been paid, and in addition to the usual provisions for taking possession and selling in case of default, reciting, “said piano being now in possession of the said H., in U. hotel,—and is to remain in possession of the said H. during the force and continuance of the mortgage,” gives H, the mortgagee, the right to possess and use the piano, and supersedes the lease.—*Barnhart v. Hanford*, 116.
4. **Water Rent**—The lessor of a hotel may recover from the lessee an amount paid by the former at the latter’s request for city water used by the latter, although at the time the lease was executed the hotel was piped for city water.—*McCarthy v. Humphrey*, 535.
5. **SAME**—In the absence of an agreement, the landlord is not bound to pay for city water used by the tenant, although the house is piped therefor.—*Idem*.

LAND SALE—See CONTRACTS, ⁵; SPECIFIC PERFORMANCE, ¹.

- **LARCENY**—See CRIM. LAW, ^{7, 8, 23, 24, 25}; EVIDENCE, ¹⁰.

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LEVY

TO

LIBEL

LAW AND FACT—See COMPOUNDING FELONY, ².LAW AND EQUITY—See JUDGMENTS, ¹²; PRACTICE, ³², ³³.LEASE—See LANDLORD AND TENANT, ², ³.**LEVY.**

Books and Book Accounts—A levy on books of account under an attachment is not a levy on the debts charged therein as Code, 1873, section 2967, provides that debts due a defendant shall be attached by garnishment.—*Pump Co. v. Miller & Sons*, 674.

LIBEL.

1. **Action in Tort**—Where one intentionally causes temporal loss to another without justifiable cause and with malicious purpose to inflict it, the natural and proximate damages may be recovered in an action of tort. And the name given an action is immaterial in determining whether sufficient facts are stated to show a right of recovery.—*Hollenbeck v. Ristine*, 488.
2. **Conditional Privilege**—**MALICE**--A letter written to an employer concerning the conduct of an employe is, at most only a conditionally privileged communication; and malice in publishing a conditionally privileged communication destroys the privilege.—*Idem*.
3. **Expression of Opinion**—Criticism or expression of opinion concerning another must be founded on fact in order to avoid being libelous.—*Idem*.
4. **Justification**—*Jury Question*—Defendant pleaded that said statements were true and the publication justifiable. The evidence intended to show that plaintiff was paid and the statute of limitations not interposed. *Held*, as the justification must be as broad as the charge, the issue should have gone to the jury.—*Idem*.
5. **RULE APPLIED**—Defendant wrote of plaintiff "He has for several years owed for medical services. His attention has been repeatedly called thereto to no purpose. That, finally, being sued therefor, he having no other defense, has cowardly slunk behind the statute of limitations. Such a course is not exactly in accordance with our ideas of strict integrity and we would prefer not to be connected in any official capacity with a corporation who employ such men in a position of trust." As a result plaintiff was discharged to his damage.—*Idem*.

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LIBEL Continued **TO** **LIM. OF ACTIONS**

6. **Per Se**—**ATTORNEYS**—A letter recited: "We are looking into the doings of this tribe of attorneys. It looks very much as though they put their heads together and each of them got as much out of the estate as possible. An outside attorney told me a few days ago that M. had put a lien on the estate for \$1,250 on account of the heirs you represent and \$500 extra to fight the church, making \$1,750 for one and the same thing. Outrage!" *Held*, to be libelous *per se*.—*Mosnat v. Snyder*, 500.
7. **Special Damages**—The publication of any untrue and malicious charge is libelous when damage is shown to have resulted as a natural and proximate consequence.—*Hollenbeck v. Ristine*, 488.

LICENSE—See **RAILROAD**, 2.

LIENS—See **ATTY'S.**, 1, 2; **CO-TENANCY**, 3; **ESTATES OF DECEDENTS**, 7; **PRACTICE**, 22.

1. **Contract**—**LANDLORD AND TENANT**—H. was to have a landlord's lien to secure advances made to erect a building on his land, which were to be repaid in monthly installments, and, on failure to make such payments, the whole amount was to become due, or H. could declare the contract forfeited, and retake the premises. *Held* that H. had a contract lien upon the premises to the amount of the unpaid advances.—*Keys v. Whitlock Mfg. Co.*, 742.
2. **SAME**—*Estoppel*—A lessor's lien for advances made to the lessee for the construction of a building upon the leased premises under an agreement to make an advance upon duplicate bills presented to the lessor for which he was to have a lien upon the building and the machinery placed therein which were to become his property upon the expiration of the lease, is paramount to a mechanic's lien for material furnished in the construction of the building, where a portion of the advance was made in reliance upon a receipt from the material man showing full payment of his bill, although by a secret arrangement between the latter and the lessee a portion of the bill remained unpaid, and the material man is estopped against lessor to show that his bill was in fact unpaid in part, though all the material went into lessor's building.—*Idem*.

LIFE ESTATES—See **LANDLORD AND TENANT**, 3.

LIMITATION OF ACTIONS—See **INTOX. LIQ.**, 4; **PLEADING**, 3, 5; **PRAC. SUP. CT.**, 24; **TAXES**, 4, 5, 6.

1. **Running of Statute**—An agreement made after a person attained his majority, as to his compensation for future services, interrupts the continuity of the services rendered by him

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LIM. OF ACTIONS Continued

before his majority without any express agreement, and an action to recover therefor is barred if not commenced within five years after the agreement.—*Salvador v. Feeley*, 478.

2. CONSTRUCTION OF STATUTE—The running of the statute of limitations against a judgment recovered in 1863, at which time the law authorized an action to be brought on a judgment at any time within *twenty* years was not stopped by Code, 1873, section 2521, providing that no action shall be brought on any judgment in a court of record within *fifteen* years after its rendition without leave of court, and section 47, providing that all previous acts revised in such Code or which are repugnant to its provisions are repealed, subject to the limitations therein expressed, and section 50, providing that the repeal of existing statutes shall not affect any right which has accrued in any civil cause before the time when such repeal takes effect.—*Wilson v. Tucker*, 55.
3. Successive Actions—NEGLIGENCE—A plaintiff in an action on a note, who negligently delays mailing the petition to the clerk for filing so long, that from a slight interruption in the mail service, the petition is not filed until two days after the date fixed in the original notice, as a result of which, under Code, 1873, section 2600, the action is dismissed on defendant's motion, cannot commence a second action to prevent the bar of the statute of limitations, under section 2537, authorizing the bringing of a new suit with such effect if plaintiff fails in his first action through any cause "*except negligence in its prosecution*."—*Conley v. Dugan*, 205.
4. SAME—One who neglects to file his petition in time, by reason of which his action is dismissed, on defendant's motion, after it is too late, on account of the statute of limitations, to commence a new action, is not entitled to a continuation of his action, under Code, 1873, section 2537, providing that, if plaintiff fail in his action through any cause except negligence in its prosecution, a new suit, if brought within six months, shall be deemed a continuation of the first; though an attorney, not shown to have any authority to act for defendant, but representing that he was employed to defend the action, negotiated for settlement, and procured extension of time to answer, thereby consuming time, till a new action was barred.—*Idem*.
5. SAME—Defendant in an action on a note, is entitled, under Code, 1873, section 2600, to a dismissal of the action where the original notice served in the action fixed the date for filing the petition and plaintiff waited so long before mailing

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TO

MARRIAGE

the petition to the clerk that from a slight interruption of the mail service the petition did not reach the clerk until two days after the time fixed for filing.—*Idem*.

LIS PENDENS—See INTOXICATING LIQUORS, ², ³.

NOTICE—In October, 1895, plaintiff sued to subject certain land to a judgment. The following December term an entry was made in the appearance docket, "Settled as per stipulation (not filed)" which entry was made without knowledge of the parties, and was not discovered and corrected until May, 1896, when plaintiffs' motion to cancel the entry was sustained. In February, 1896, plaintiffs filed a trial notice, reciting that the cause would be called at the March term, which was entered on the appearance docket. The cause was continued March 5th, at request of defendant, by an entry, "Continued by agreement of parties." Intervener purchased the property in dispute on March 7, 1896, in good faith and for value, relying upon the December entry, that the cause had been settled. It does not appear that plaintiffs were negligent in not sooner discovering said entry. *Held*, that the subsequent action by plaintiffs, reinstated the case, and it being before intervenor's purchase, was constructive notice of plaintiffs' rights therein, under Code, 1878, section 2628, providing that when a petition has been filed, affecting the real estate, the action is pending, so as to be notice thereof to third persons.—*Furry Bros. v. Ferguson*, 231,

LOANS—See SAVINGS BANK.

MALICE—See LIBEL, ².

MANDAMUS—See PRACTICE, ²¹, ²², ²³.

MARRIAGE.

1. **SUFFICIENCY OF EVIDENCE TO ESTABLISH**—A man induced a married woman to live with him, and paid the expenses of a divorce secured by her. He often declared that he would like to marry her, and fear of giving offense to his sister, alone restrained him. She testified that July 27th they went to a distant town and were married, and produced a certificate dated July 28th, which she claimed was a mistake in date. He could sign his name with great difficulty, and the procurer of the license signed the record with a mark. Acquaintances of both parties testified to their going and returning from said town on the 27th, and a number testified that she was home all day the 28th. July 31st he had the scrivener of his will prepare a bequest for her in her maiden name. He died in September, and she alone cared for him in his last sickness. His relatives claim that on July 28th another person impersonated him when

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MARRIAGE Continued

TO

MECH. LIENS

they were married, and all witnesses to the marriage except one described a certain man, who was proved to be elsewhere on that day. *Held*, that they were married.—*Johnson v. Clancy*, 242.

2. *Same*—A finding that defendant was the widow of the plaintiff's testator is sustained by the evidence already set out, that testator and defendant were at one time engaged to be married and the engagement was broken off because of a quarrel and that defendant married another person, that the testator succeeded in inducing her to leave her husband and maintain illicit relations with him, that he induced her to secure a divorce from her husband, paying all the expenses, that defendant was married to some one stated in the marriage certificate to bear the same name as the testator, that the testator stated he was going to the place where the marriage occurred to be married on the day before the date of the marriage certificate and that during his last illness defendant cared for him night and day rendering all the most private offices, although the evidence shows that the marriage could not have occurred on the date of the certificate.—*Idem*.

MARSHALLING ASSETS.

1. A creditor who has a lien upon two funds may be compelled by a creditor having a subsequent lien upon one alone of such funds to resort in the first instance to that fund which is covered by his lien alone.—*Richards v. Cowles*, 734.
2. *SAME*—The equity of marshalling assets does not fasten itself upon the situation at the time the successive securities are taken but is to be determined as of the time the marshalling is invoked. It can only become a fixed right by taking proper steps to have it enforced, and until this is done it is subject to displacement and defeat by subsequently acquired liens upon the funds.—*Idem*.
3. *INTERVENTION*—Where a creditor intervenes in an action by another creditor who, by a prior garnishment, had acquired a higher and better right to the fund than he had, it does not present a case for the application of the equitable doctrine of marshalling assets.—*Idem*.

MASTER AND SERVANT—See RAILROADS, ², ³.

MAXIMS—See DEED AS MORTGAGE, ⁴.

MECHANICS LIENS—See MORTGAGES, ¹⁰; NOTICE BY PUBLICATION; PRACTICE, ¹⁶; PRAC. SUP. CT. ⁴⁹.

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MECH. LIENS Continued

1. **Actions in Rem**—An action to foreclose a mechanic's lien, where no personal judgment is asked, is a proceeding *in rem*.—Simonson Bros. Mfg. Co. v. Bank, 264.
2. **Assignment**—SUBSEQUENT INCUMBRANCERS—An assignee of a claim for labor and materials furnished in the construction of a house, is entitled to a mechanic's lien therefor, as against persons other than subsequent purchasers or incumbrancers in good faith, although the lien has not been perfected by filing a statement prior to the assignment, under Acts Sixteenth General Assembly, chapter 100, section 6, providing that every person who wishes to avail himself of the provisions of the statute shall file a verified statement of the demand due him, and that such statement must be filed by a principal contractor within ninety days, and by a sub-contractor within thirty days, but that a failure to file the same within the periods mentioned shall not defeat the lien except against purchasers or incumbrancers in good faith.—Peatman v. Centerville L. Co., 1.
3. **SAME**—A judgment creditor whose judgment is rendered nearly a year after the statement of a mechanic's lien is filed on the premises of the judgment debtor, is not a subsequent incumbrancer in good faith within Acts Sixteenth General Assembly, chapter 100, section 6, requiring every person claiming a mechanic's lien to file a verified statement of the demand due him within a specified time, and providing that a failure to file the same within such time shall not defeat the lien except as against purchasers or incumbrancers in good faith, without notice, whose rights accrued after the expiration of the time specified and before any claim for the lien was filed.—*Idem*.
4. **WAIVER**—Though Acts Sixteenth General Assembly, chapter 100, section 13, provides that mechanics' liens are assignable, and follow the assignment of the debt, a person entitled to such a lien may waive it, and may also assign the debt without the lien.—*Idem*
5. **Blending Accounts**—Where in a mechanic's lien account, the value of items for which the law gave no lien was not stated, and they were blended with lienable items, the entire lien is defeated.—*Idem*.
6. **Burden of Proof**—A sub-contractor seeking to foreclose a mechanic's lien has the burden of proving what was due the principal contractor at the commencement of such sub-contractor's account, or at the time the notice of lien was served.—Simonson Bros. Mfg. Co. v. Bank, 264.

MECH. LIENS Continued

7. **Statement—MISTAKE**—Under Code, section 8092, requiring that a statement of account be attached to the affidavit for a mechanic's lien, setting forth the time when the different items thereon were furnished, mere inaccuracies in fixing the time do not defeat the lien.—*Johnson v. Otto*, 605.
8. **SAME**—The filing of a statement for a mechanic's lien is not necessary to create a lien under the statute, as between the parties, and therefore the filing of an erroneous statement will not necessarily defeat the right of a contractor to a lien.—*Hoppes v. Bale*, 648.
9. **SAME**—The mistake that will nullify the statement for a mechanic's lien, must, when no one is directly injured, be willful and intentional.—*St. Croix Lumber Co. v. Davis*, 27.
10. **Rule Applied**—One who furnishes material for use in a building in the process of construction will not be denied a lien for the full amount furnished, although some of the items are not used in the building.—*Idem*.
11. **SAME**—An honest mistake on the part of the manager of a corporation which furnishes materials for the construction of a building, in making out a statement for a lien for the entire amount, including an account against the person acting as agent for the owner, will not invalidate the lien, although the bookkeeper placed in such account items for materials, which, to his knowledge, did not go into the building, especially where the trial court restated the account, deducting such items and allowing a lien for the balance, alone.—*Idem*.
12. **SAME**—Where the statement for a mechanic's lien, by an honest mistake, which harmed no one, was for a greater sum than was due, is does not defeat the lien.—*Simonson Bros. Mfg. Co. v. Bank*, 264.
13. **Subcontractor**—Where the contract between the principal contractor and an owner was that the owner was to pay for the work and material as the building progressed, and the owner knew that a subcontractor was furnishing material for the building, and that he was not being paid by the principal contractor, if the owner settles with the principal contractor who files his statement of lien in due time, without holding back enough to pay the subcontractor, the latter will be entitled to his lien therefor.—*Simonson Bros. Mfg. Co. v. Bank*, 264.
14. **WELLS**—A well, designed, sunk, and completed for permanent use is an improvement within Acts Sixteenth General Assembly, chapter 100, section 8, giving a mechanic's lien for material or labor furnished for any building, erection or other improve-

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ment upon land, upon the building, erection or improvement and upon the land.—*Hoppes v. Baie*, 648.

15. **Who Entitled to**—A lien may be acquired for the labor of a man who operates a gas plant for thirty days and tests the machinery and causes it to meet the requirements of the guaranty given, under the statute providing that a lien may be acquired by any person who shall do any labor upon any building or make any other improvement upon land.—*Peatman v. Centerville L. Co.*, 1.
16. **SAME**—A contractor for the erection of a gas plant is not entitled to a lien for services rendered in instructing the superintendent.—*Idem*.
17. **SAME**—A mechanic's lien cannot be acquired by a contractor for the erection of a gas plant, for the assignment of patent rights which are not included in the use of the appliances which the contractor was required to furnish.—*Idem*.

MEDICAL BOOKS—See **EVIDENCE**, ¹², ¹³.

MEMBER OF FAMILY—See **CONTRACTS**, ¹⁰, ¹¹.

MINORS—See **JUDGMENTS**, ⁵; **LIMITATION OF ACTIONS**, ¹; **PRACTICE**, ²⁶.

MINUTES OF EVIDENCE—See **CRIM. LAW**, ¹⁹, ²⁰, ²¹; **EVIDENCE**, ¹⁴.

MISCONDUCT OF COUNSEL—See **PRAC, SUP, CT**, ²⁸, ²⁹.

MISTAKE—See **EQUITY**, ²; **INSURANCE**, ¹²; **MECHANIC'S LIEN**, ¹¹, ¹², **PRAC, SUP, CT**, ¹⁴; **TAXES**, ⁴, ⁵.

MORTGAGES—See **AGENCY**, ¹⁷; **BONA FIDE PUR.**, ¹, **DEED AS MTGE.**, ¹, ², ³; **FRAUD**, ¹, ¹⁴; **GENERAL ASSIGNMENT**, ¹, ²; **LANDLORD AND TENANT**, ²; **PRACTICE**, ²³, ⁴⁰; **SALKS**, ¹, ².

1. **Consideration**—The makers of a note agreed to secure it with a mortgage upon certain property as soon as they secured title thereto, and by agreement the payee was to transfer to the makers of the note a certain judgment and note, which she did. *Held*, that the assignment of the judgment and transfer of the note were a sufficient consideration for the subsequent execution of the mortgage.—*Fox v. Gray*, 433.
2. **Delivery**.—Under a contract between a debtor and creditor collateral to the execution of mortgages to secure their claims, mortgages, except to one of the creditors, were delivered at the time, and an agent of the mortgagees appointed to take possession. By a condition of the contract, ratification of the contract by the other creditor was to be optional. *Held* that, all the creditors having signed the contract, the minds of the parties met in the delivery of the mortgages.—*Groetzinger v. Wyman* 574.
3. **Description of Amount**—A statement in a deed of land that is sold "subject to one existing mortgage of \$300.00," is merely

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descriptive and is not intended to fix the exact amount due thereon.—*Johnson v. Nichols*, 122.

4. **Foreclosure—*Default in Interest***—A mortgage subsequently made in pursuance of a written agreement to do so when a note was executed which it secured, provided that on default in payment of interest the whole debt was to become due and collectible. *Held*, that the fact that no such provision for maturity and collection was made in the note, was no defense to a foreclosure, regardless of the fact that the mortgage was in pursuance of a written agreement.—*Fox v. Gray*, 433.
5. **SAME**—A mortgage containing a condition that failure to pay any installment of principal or interest when due, renders the mortgage subject to foreclosure at the holder's option may be foreclosed for a failure to pay an installment of interest, although the note secured by the mortgage states that interest is payable annually, and that interest when due is to become principal and draw a specified rate of interest.—*Idem*.
6. **Payment—INNOCENT PURCHASER**—The maker of notes secured by mortgage, who gives a second series of notes and mortgages to the mortgagee, knowing that the first notes have been transferred, is not thereby relieved from liability to innocent holders for value of such first notes.—*Savings Bank v. Colby*, 424.
7. **SAME—Assignment**—Where a mortgage and the notes secured thereby are assigned by the mortgagee, and the assignor does not record his assignment, and subsequently the mortgagee, without authority from the assignee, takes another mortgage on the same property, and new notes in renewal of the first mortgage and debt, and releases the first mortgage of record, and transfers the new notes to a national bank, but does not inform the bank of the security, and does not assign it, the second mortgage does not follow the debt it was given to secure. National banks are forbidden by act of congress to deal in real estate securities as original investments.—*Idem*.
8. **Recording—Agreements**—M. executed chattel mortgages to a bank, under a written agreement "that said mortgages shall not be recorded unless in the judgment of said bank, it shall become necessary for the protection of the mortgagee, or unless said M. shall be unable to secure extensions of time from all other creditors." *Held*, that this left the matter of recording within the discretion of the bank.—*Groetzinger v. Wyman*, 574.

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9. **SAME**—An understanding that a chattel mortgage shall not be recorded unless in the mortgagee's judgment it is necessary for its protection or unless the mortgagor shall be unable to secure extensions of time from his other creditors does not invalidate the mortgage as against other creditors in the absence of any purpose by the mortgagor to obtain an extension of time from his other creditors without disclosing the existence of a mortgage.—*Idem*.
- 10 **Release**—*Liens*—A mortgage on land is not released, so as to let in a subsequent mechanic's lien, by the mortgagee's taking, after the right to lien has accrued, a deed to the premises, as security for the amount included in the first mortgage, and a new loan, unless there was a clear intent that it should have that effect.—*St. Croix Lumber Company v. Davis*, 27.

MOTION—See PRAC. SUP. CT. ², ¹⁰.

MUNICIPAL CORPORATIONS.

1. **Severance of Territory**—*Evidence*—The owners of unplatted and exclusively agricultural land within the limits of a city are not as matter of law entitled to have such land severed from the city on the claim that it is not needed for any possible increase of the city's population, that they are prejudiced by being taxed on a higher valuation than similar farm lands outside of the city and do not receive a due proportion of benefit therefrom, and that they are deprived of school advantages which they would enjoy if the land were severed from the city; and such facts do not warrant the setting aside of a verdict for the city.—*Christ v. City of Webster City*, 119.
2. **Waters**—*Injunctions*—A city, which, in accordance with Acts Nineteenth General Assembly, chapter 89, section 3, and Code, 1873, section 527, has made substantial improvements of a permanent character to keep open the natural outlet for surface water flowing through a water course, may maintain an action to enjoin the obstruction of such water course by the owners of the land through which it runs, although it is dry at all times except in cases of melting snow or unusually heavy rains, at which times water flows into it only a few days at a time, where such diversion or obstruction may entail serious consequences on the city or the people interested in the drained territory.—*City of Waverly v. Page*, 225.

MURDER—See CRIM. LAW, ²⁶, ²⁷, ²⁸.NAME—See CRIM. LAW, ¹⁷.NATIONAL BANKS—See MORTGAGES, ⁷.

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NEGLIG.

TO

NOTES

NEGLIGENCE—See AGENCY, ⁴; INSTRUCTIONS, ²; LIMITATION OF ACTIONS, ², ⁴, ⁵; RAILROADS, ², ⁶, ⁹, ¹⁰, ¹¹, ¹²; REFORMATION; SIDEWALKS, ².

1. **Contributory Negligence**—A person who knows of a defect in a walk but that it can be passed in safety by the exercise of ordinary care and is justified as a reasonably prudent man in holding that belief, is not guilty of contributory negligence in attempting to pass over in an ordinarily careful and prudent manner.—*Graham v. Town of Oxford*, 705.
- **RULE APPLIED**—An instruction that if the fall of plaintiff was caused by a loose plank on the sidewalk as claimed, then it would be necessary for the jury to determine whether defendant was negligent, and whether plaintiff was in the exercise of ordinary care, was not erroneous because of the admitted fact that plaintiff knew of such defect before the accident and could have avoided such danger by going another way.—*Idem*.

NEW TRIAL—See PLEADING, ², PRAC. SUP. CT., ⁴⁰, ⁴¹.

1. **Affidavits—Impeachment of verdict**—Affidavits of jurors that they misunderstood the instructions cannot be considered on a motion for a new trial, to impeach their verdict.—*Christ v. City of Webster City*, 119.
2. **Granting—Discretionary**—The granting of a new trial is in the sound discretion of the lower court.—*Scott v. Hawk*, 467.
3. **SAME**—Where the special finding, of the jury sustains the defenses pleaded by defendant, a motion for a new trial by plaintiff should be refused.—*Moore & Co. v. Horton*, 376.
4. **NEWLY DISCOVERED EVIDENCE**—A new trial should be granted to defendant in an action on a note, for newly discovered evidence that a given stallion was sold to defendant at the time the note was dated, that such stallion was not a good breeder and that plaintiff's agent knew such fact from actual observation and from statements made to him by persons who had bred their mares to the horse and that such agent had made admissions that he had had "trouble" with the stallion, though the granting of such new trial rests largely in discretion.—*Horse Importing Co. v. Novak*, 157.
5. **Trial of Issue**—Issues presented in a petition for new trial are triable as in ordinary actions.—*Scott v. Hawk*, 467.

NOMINAL DAMAGES—See PRAC. SUP. CT., ⁵⁶.

NOTES—See EVIDENCE, ⁵.

1. **Delivery by Indorsement—Presumption**—Plaintiff in an action upon a negotiable promissory note, indorsed by the payee, is

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NOTES Continued

TO

NOTICE BY PUB.

bound to show that it was delivered to her by the payee with the intention of transferring the title, and she cannot rest upon the legal presumption of delivery arising under the statute from the indorsement alone, where the note is in possession of the defendant and it is denied that it was ever delivered to plaintiff.—*Moehn v. Moehn*, 710.

2. *SAME—Instructions*—An instruction that a presumption of ownership arises from possession of a note indorsed by payee, and, while so possessed, without further evidence, is not in conflict with the foregoing rule as to presumptions arising under statute. The statutory presumption would govern if plaintiff possessed the note, and this instruction applies properly to such time as it may have been in her possession.—*Idem*.
3. *Suit on—Personal Judgment*—The defense of a married woman, sued jointly with her husband on a note and mortgage made by them, that she signed for the purpose of relinquishing her dower only, is not sufficient to prevent the recovery of a personal judgment against her.—*Wood v. Dunham*, 701.

NOTICE—See ADVERSE POSSESSION, ⁵; AGENCY, ¹⁸; BONDS, ⁵; BON A FIDE PURCHASER, ¹; INSURANCE, ¹⁸; INTOX. LIQUORS, ⁵; LIS PENDENS; PRACT. SUP. CT., ¹¹; TAXES, ⁵, ¹⁰, ¹¹, ¹², ¹³.

NOTICE BY PUBLICATION—See JUDGMENTS ².

Adjudication Upon—Code, 1873, section 2618, subdivision 5, provides that jurisdiction may be obtained of a defendant on service by publication "in actions brought against non-residents of this state, or a foreign corporation, having in this state property or debts owing to such defendant, sought to be taken by any of the provisional remedies, or to be appropriated in any way." *Held*, that a subcontractor, who holds an open, unliquidated account against the principal contractor may bring an action against the owner to foreclose his lien, and, in the same action have adjudicated the amount of his claim against the principal contractor, who is served, only by publication, with notice of the action.—*Simonson Bros. Mfg. Co. v. Bank*, 264.

NUISANCE—See COSTS, INTOX. LIQUORS, ⁴, ⁵.

NUNC PRO TUNC—See JUDGMENTS, ⁵, ⁷, ⁸, PRACTICE, ³⁷.

OBJECTIONS—See EVIDENCE, ⁶, ⁷, PRACTICE, ⁹, ²⁵, ²⁶, PRAC. SUP. CT., ⁴³, ⁴⁴, ⁴⁵, ⁴⁶, ⁴⁷, ⁴⁸.

OFFER TO RETURN—See FRAUD, ¹³.

OPINION EVIDENCE—See ALIENATING WIFE'S AFFECTIONS, ⁴.

ORIGINAL NOTICE—See CORPORATION'S, ², ³, ⁴, ⁵; JURISDICTION, ².

PARENT AND CHILD—See EVID. ³; FRAUD. CONVEY. ¹, ³, ⁴; PRAC. ¹⁵.

PAROL VARIANCE—EVID. ¹⁵, ¹⁷, ¹⁸.

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PARTITION

TO

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PARTIES—See INTOX. LIQUORS, ⁶; PRACTICE, ³⁶.

PARTITION.

Judgment—One to whom lots bounded by a designated street are awarded in partition proceedings, takes land on the opposite side of the street to the high-water mark of the Mississippi river, subject, only, to the easement for street purposes, where the report of the commissioners which is confirmed by a decree of the court states that the lots upon such street include all the land in front of them, to such river.—C. B. & Q. Ry. Co. v. Kelley, et al, 106.

PAYMENT—See AGENCY, ⁹, ¹³, ¹⁴, ¹⁵, ¹⁶, ¹⁸; MTGS. ⁶, ⁷; REDEMPTION, ¹.

PENALTY—See INTOX. LIQUORS, ⁴.

PERJURY—See CRIM. LAW, ³², ³³.

PLEADING—See ATTACHMENT, ¹; DURESS, ², ³; HOMESTEAD, ¹; INSURANCE, ¹², ¹³; WARRANTY, ⁴.

1. **Action for Rent—Set Off**—Plaintiff in an action for rent, being unable under Code, 1873, section 2018, to join other matter with his claim if he would effectuate his lien, is entitled to offset claims against the defendant in reply to the latter's counterclaim, under Code, 1873, sections 2666, 2667, providing that in such an action plaintiff may reply to the counterclaim by pleading any new matter not inconsistent with petition constituting a defense to the matter alleged in the answer, and that any number of defenses negative or affirmative may be pleaded to a counterclaim.—*Illsly v. Grayson*, 685.
2. **Petition for New Trial—Demurrer**—A petition for a new trial on the ground of newly discovered evidence is not demurrable because it contains merely a general averment of diligent search and inquiry, and inability to obtain the evidence set out, where the specific acts done are not called for.—*Scott v. Hawk*, 467.
3. **Replevin**—The petition in replevin to recover the possession of a note need not allege that defendant wrongfully detained the note.—*Kennedy v. Roberts*, 521.
4. **SAME**—A petition in replevin to recover the possession of a note reciting that such note is of no value except as a matter of evidence, and that for such purpose only it is of a specified value sufficiently alleges the actual or apparent value as required by the statute.—*Idem*.
5. **Reply**—Matters which are material alone to the cause of action alleged in the petition cannot be pleaded in reply and there

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- can be no recovery on a distinct cause of action which is pleaded only in a reply.—*Hunt v. Johnston*, 311, 320.
6. **SAME**—Where the answer is simply a denial, a reply is not permissible.—*Idem*.
 7. **SAME**—A reply asking that certain notes and mortgages, alleged to constitute the consideration for conveyances sought to be set aside, be canceled of record should be stricken from the files where no such relief was sought in the complaint, and the answer was simply a denial.—*Idem*.
 8. **Statute of Limitations—Answer or Demurrer**—The defense that a claim in suit is barred by limitation can be taken only by answer and not by demurrer, where the petition does not show on its face that the claim is barred.—*Goring v. Fitzgerald*, 507.
 9. **Striking—Harmless Error**—Possible error in striking out portions of a petition is not prejudicial, where there is sufficient remaining to raise the issue relied on.—*Idem*.
 10. **SAME**—A refusal to strike out matter from a pleading on the ground that it is a repetition is without prejudice.—*Kennedy v. Roberts*, 521.

PLEA AND PROOF.—See DAMAGES, ³; PRACTICE, ²⁷; REPLEVIN, ⁴.

STATUTES—Statutes of another state need not be pleaded where they are merely evidence of ultimate facts, as for instance, where the statutes of another state relating to the manner of acquiring jurisdiction of foreign corporations are relied upon to sustain an averment of the due rendition of a judgment against such a corporation and to rebut evidence that the judgment was rendered without jurisdiction.—*Green v. Life Association* 628.

PRACTICE—See CRIM. LAW, ¹³; DAMAGES, ⁷; CO-TENANCY, ¹; EVIDENCE, ²; ESTATES OF DECEDENTS, ², ³, ⁴, ¹¹; HIGHWAYS; FRAUD, ¹³; INSTRUCTIONS, ⁸, ¹⁰, ¹²; INTOX. LIQUORS, ⁶; JUDGMENTS ³, ⁴, ¹⁰, ¹³; LIMITATIONS OF ACTIONS, ², ⁴, ⁵; LIS PENDENS; LIBEL, ¹; MUNICIPAL CORP., ²; NEW TRIAL, ¹, ⁴, ⁵; PLEADING, ⁶, ⁶, ⁹; RECEIVERS; REPLEVIN, ², ³.

1. **Accepting Jury—Waiver**—A party who accepts the jury and comes to trial without objecting cannot be heard to complain either of the character of the jury or the time of the trial.—*Frank v. Davenport*, 588.
2. **Amendment—Discretion**—Refusal of leave to amend pleadings to conform to proof was not an abuse of discretion, where the

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- motion was made several days after verdict.—*Ankrum v. City of Marshalltown*, 493.
3. **SAME**—Leave to file an amendment setting up an entirely new and distinct issue of which applicant knew all the time may properly be refused in the discretion of the court, when asked at the conclusion of the evidence on a second trial, no good reason appearing for not filing the same earlier, and the refusal being moreover, without prejudice.—*Horse Importing Co. v. Novak*, 157.
 4. **REPLEVIN**—Where an action in replevin has been begun in good faith, and facts subsequently discovered indicate that the relief sought is obtainable only in a suit in equity, the plaintiff should be allowed to amend his petition to one in equity.—*Cox Shoe Company v. Adams*, 402.
 5. **Assignment of Causes**—The trial court is not required to assign the different causes for trial on particular days under a rule of court providing that on the first day of the term or as soon thereafter as practicable, the court “may” make an assignment of the trial causes which shall fix the day of the term on which each cause shall be tried, and the court has a discretion in the matter which will not be interfered with unless abuse of it is shown.—*Slocum v. Brown*, 209.
- Bonds**—See ²⁴, ²⁵, *post*.
6. **Change of Place of Trial—Waiver**—Defendant does not waive the overruling of a motion to change the venue to the county of her residence by answering the petition.—*Foss v. Cobler*, 728.
 7. **Consolidation**—Separate action on two notes against different makers and the same indorser are properly consolidated where only the indorser is served and there is nothing to show the plaintiff intends that the other parties shall be served.—*Bank of Montreal v. Ingerson*, 349.
 8. **SAME**—Code, section 3644, provides that where two or more actions are pending in the same court, which might have been joined, they may be joined on motion of defendant. *Held*, that the remedy therein provided is not exclusive, and that suits in equity begun in the same court by a number of vendors against a common vendee and a mortgagee of the vendee, to rescind their contracts of sale and set aside the mortgage, may be consolidated on motion of the plaintiff.—*Cox Shoe Co. v. Adams*, 402.
- Cross Examination**—See ¹⁰, *post*.
- Default**—See ²⁹, ³⁰, *post*.
9. **Depositions in Shorthand**—Code, 1873, section 3735, providing that when depositions are taken in shorthand the writer shall

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- be duly sworn to take the same correctly, and to make correct extension thereof into longhand, and that the notes shall be signed by the witness after being read over to him, and be filed with the extension, does not require that the translation of the notes be signed or sworn to by the witness; nor is any agreement essential to the taking, if no objection is made to taking them in shorthand.—*Slocum v. Brown*, 209.
10. **CROSS-EXAMINATION**—Witnesses whose depositions have been taken will not be required to appear on the trial for cross-examination because the attorney for the opposite party was not present at the time the depositions were taken, where there was not sufficient excuse for his failure to be present.—*Idem*.
 11. **SUPPRESSION**—That the attorney for plaintiff was unable to reach the place where depositions were taken, by rail, at the time fixed for the taking, after the time he started, is not a ground for excluding the depositions, where he might have reached the place in time by starting earlier or by a private conveyance.—*Idem*.
 12. **Directing Verdict**—A motion for the direction of a verdict by the party having the burden of proof should be denied unless considering all the evidence it clearly appears that it would be the duty of the court to set aside a verdict rendered for the other party.—*Guthrie v. City of Dubuque*, 653.
 13. **Rule Applied**—In an action against a city to recover for grading done under a written contract, in which the city reserved the right to increase or diminish the amount of grading, where there is a dispute as to the actual amount of grading done, owing to the inaccuracy of a bench mark, the question should be submitted to the jury.—*Idem*.
 14. **SAME**—A verdict cannot properly be directed for plaintiff unless the court is able to say, after giving defendant the benefit of facts as to which there is a substantial conflict, that a finding for him would not be supported by the evidence.—*Kubic v. Zemke*, 269.
 15. **Rule Applied**—Plaintiff sued for necessities furnished defendant's son, a minor. The son had lived with defendant only four and one-half month's when he was fifteen years old, and then worked for defendant under a contract to receive wages, and left because he did not want to stay, to which the father consented. *Held*, that it was error to direct a verdict for plaintiff.—*Idem*.

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16. **Election**—The assignee of a mortgage did not record its assignment, and the mortgagee subsequently, without authority, released the mortgage, and took a new mortgage and notes in renewal of the old ones, and sold the new notes, and afterwards made a trust deed for the benefit of his creditors including the assignee of the first mortgage. The assignee of the first mortgage placed his assignment on record, and began action to foreclose. *Held*, that the contribution toward the expense of foreclosing the trust deed, made for the assignee by one whose authority to do so is not shown, is not an election to take under the trust deed.—*Savings Bank v. Colby*, 424.

False Representations—See ²⁰, *post*.

Instructions—See ²⁰, *post*.

17. **Judge**—See ²⁰, *post*—**QUESTIONS BY**—The trial judge may ask questions leading in character.—*State of Iowa v. Marshall*, 38.
18. **Judgment**—*Without Plea and Proof*—Mechanic's liens should not be allowed to parties in an action to foreclose a mechanic's lien who file no pleadings and introduce no evidence.—*St. Croix Lumber Co. v. Davis*, 27.
19. **PRAYER**—A decree in a creditor's bill for the cancellation of certain notes and mortgages alleged to constitute the consideration for the conveyances sought to be set aside is improper, where there is no prayer in the petition for the cancellation of such mortgages and no reference of any kind is made to them.—*Hunt v. Johnston*, 811.
20. **Jury Question**—**FALSE REPRESENTATION**—*Scienter*—A failure of evidence tending to show scienter justified a court in refusing to submit to the jury the issue of false and fraudulent representations in the sale of a horse, in an action to recover the purchase price thereof.—*Horse Importing Co. v. Novak*, 157.
- Law and Equity**—See ²⁰, *post*.
- Liens**—See ²⁰, *post*.
21. **Mandamus and Mandatory Injunction**—Mandamus, and not mandatory injunction, is the proper action to compel a corporation to post its by-laws, as provided by Code of 1873, sections 1076-1077.—*Boardman v. Grocery Co.*, 445.
22. **RIGHT TO MANDAMUS**—A corporation cannot be compelled by mandamus to post its by-laws, as provided by Code, 1873, sections 1076, 1077, unless plaintiff pleads or proves a personal interest entitling him to the writ (sections 8377 and 8378).—*Idem*.

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23. *Denial of Future Inspection*—In an action for a mandatory injunction to compel a corporation to permit plaintiff to inspect its stock book, where the corporation by its answer tenders such right to him, he cannot claim he is entitled to further relief because of mere suspicion that at some future time the right might be denied him.—*Idem*.
24. *Objections*—A party who makes no objection to a question asked a witness, cannot ask that it be stricken from the record, where the answer is unsatisfactory to him.—*State of Iowa v. Marshall*, 38.
25. *SAME*—An objection to the competency of the county attorney as a witness on a criminal trial, because his name was not indorsed on the indictment, is too late, when made after his evidence has been given, although the trial judge asked the questions and defendant's counsel claims to have refrained from making objections out of deference to the court.—*Idem*.
26. *EXAMINATION BY JUDGE*—Defendant on a criminal trial may, where questions are asked by the judge, object when the questions are asked, or move to strike out the evidence elicited, immediately on the conclusion of the judge's examination.—*Idem*.
27. *PLEA AND PROOF—Waiver*—Where defendant, without objection, permits plaintiff to introduce evidence of pain and suffering which tends to prove the alleged disability, he does not thereby concede plaintiff's right to recover for bodily pain and mental anguish not prayed for in the petition.—*Ankrum v. City of Marshalltown*, 493.
28. *Offered Instructions*—Requested instructions are properly refused where the subject matter thereof is contained in the charge as given.—*Snouffer v. Railway Co.*, 681.
29. *Opening Default*—There was no abuse of discretion in denying a motion to excuse and set aside a default on the ground that the failure of defendants to enter their appearance was caused "by some accident or oversight" on part of their attorney, where the affidavit failed to show what caused the alleged accident or oversight, or what care was taken to avoid such result.—*Martin v. Reese*, 694.
30. *DEFAULT*—A defendant who asks to have his default set aside must plead issuably, and also present a reasonable excuse for the default.—*Idem*.
31. *Opening up Case—Discretion*—Where on conclusion of the evidence, parties consented that the trial should be resumed and argument and submission made and decree entered in vacation

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as of the last day of the term, and plaintiff, discovering, by argument of defendant, served on him, his omission to lay a foundation for the admission of the certified copies which proved his title, asked leave to introduce further evidence to correct the oversight, the record not showing at the time, a final submission of the case, it was not abuse of discretion to give such leave.—*District of Oakland v. Hewitt*, 663.

82. **SAME**—It is not an abuse of discretion to refuse to admit additional testimony after the trial has closed and the witnesses departed, where the failure to produce the testimony did not occur through oversight.—*Banning v. Purinton*, 642.

Plea and Proof—See ⁿ, *ante*.

Prayer—See ⁿ, *ante*.

83. **Priority of Liens**—*Law and Equity*—A mortgage given for a consideration, only a part of which constitutes a superior lien as to other creditors, cannot be set aside in a court of law, but a court of equity may order it satisfied to the extent that it is a first lien, and discharged as so the remainder.—*Cox Shoe Co. v. Adams*, 40².

Replevin—See ⁿ, *ante*.

84. **ADDITIONAL BOND**—Plaintiff in replevin to recover possession of a note should not be required to give an additional bond on the ground that the bond originally given is less than the value of the note, where pending the motion the note is brought into court and deposited with the clerk to abide the judgment of the court.—*Kennedy v. Roberts*, 531.
85. **SAME**—Refusal of a motion to require plaintiff in replevin to give an additional bond, if error, is not prejudicial to defendant where the jury by their verdict find the plaintiff entitled to the property.—*Idem*.
86. **Substitution**—*Appeal*—Under Code, 1873, section 2565, providing that the action of a minor must be brought by his guardian or next friend, but giving the court power to substitute his guardian or another person as a next friend; and section 2689, relating to proceedings in district court allowing the addition or striking out of the name of a party,—a district court can, in an action begun by a minor in justice court in his own name, and appealed, substitute his next friend as plaintiff.—*Parkins v. Alexander*, 74.
87. **SAME**—*Order nunc pro tunc*—Where, for the trial of an action, the plaintiff's administrator is substituted for the original plaintiff, but judgment is taken in the name of the original plaintiff, which judgment is subsequently corrected in that

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respect, but the order correcting it is not signed until after an action in the nature of a creditor's bill to subject the property to a judgment has been begun on the judgment by plaintiff's administrator, the order may be made *nunc pro tunc*, and, when entered, cures the defect in the judgment, and validates all subsequent proceedings thereon.—Hunt v. Johnston, 811.

38. **Transfer to Equity**—Plaintiff sued for the price of certain real and personal property conveyed by warranty deed and bill of sale, and alleged that the instruments, though absolute in form, were given only as security, but did not allege fraud or mistake, nor ask to set aside or reform them, nor for the establishment of any trust in the property conveyed, or the proceeds thereof, nor any equitable relief whatever, but asked for the difference between what defendant agreed to pay for the property and the credits he was entitled to. The defendant admitted the execution of the instruments, denied the other allegations and pleaded payment and settlement. *Held*, the issue thus made was one of law, and the court properly refused to transfer it to equity for trial.—Boyce v. Allen, 249.
39. **SAME**—A motion to transfer to the equity side of the calendar, an action to recover rents and profits of certain land, is properly overruled, where a judgment assigned to plaintiff, which is a lien on land and interposed as a defense, does not constitute any defense.—Boggs v. Douglass, 844.
40. **Vendor's Lien—DEFENSES BY MORTGAGEE—Antecedent Debt**—Where a mortgage is given on property to secure debts antedating the purchase of the property, no defense is available to the mortgagee, in replevin by the vendors of such property, which cannot be set up by the mortgagor.—Cox Shoe Co. v. Adams, 402.

Waiver—See *Ante*, 1, 27.

PRACTICE SUPREME COURT.

Abstracts—See 16, 20, 21, 44, *post*.

Affidavits—See 41, *post*.

1. **Affirmance—CONDITIONAL**—When the jury is not directed to allow interest and it may be ascertained from the verdict that interest in a certain sum is included, the district court should on motion for a new trial, grant same unless the said sum is remitted, and if this be not done this court may, on appeal, order an affirmance conditioned upon a remittitur of said sum, and that if the sum be not remitted the judgment be affirmed

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with a modification reducing the judgment by a deduction of said interest.—*Hart v. Accident Association*, 717.

Amendment—See ³, *post*.

Argument—See ⁴, *post*.

2. **Assignments**—An assignent that the court erred in not sustaining and in overruling plaintiff's motion for a new trial for the several grounds therein set forth is not sufficiently specific to enable the supreme court to consider the only ground on which the motion should have been sustained, where there were at least eight separate grounds set out in the motion.—*Sisson v. Kaper*, 599.
3. **AMENDMENT**—An amended abstract presenting additional assignments of error will be considered though filed without leave of the court after appellant had filed his argument, but served though not filed more than ten days before the trial term, where the appellee did not move to strike the amendment but after insisting that appellant had no right to file the same proceeds to present his argument upon such amended assignments, and it is apparent that the submission of the appeal has not been delayed and that the appellee has not been in any manner prejudiced by the filing of the amendment.—*Salvador v. Feeley*, 478.
4. **ARGUMENT**—Assignments of error to the giving of instructions, if relied upon in the supreme court, must be argued.—*Sisson v. Kaper*, 599.
5. **REASON**—Under Code, 1873, section 3207, and supreme court rules, section 36, requiring assignments of error to point out the errors objected to, an assignment which does not give any reason why the ruling complained of is erroneous is insufficient.—*Salvador v. Feeley*, 478.
6. **REVIEW IN EQUITY**—Under existing statutes (sections 2741, 2742, Code of 1873, as amended by chapter 88, Acts Eighteenth General Assembly, and chapter 145, Acts Seventeenth General Assembly) equitable actions must be tried on such evidence as the law deems to be written evidence, and unless there is written evidence preserved as those statutes direct, issues of fact in an equitable action will not be reviewed on assignment of error though the evidence may have been so taken and preserved as to warrant review were it still permissible to try equitable actions as law actions.—*Smith v. Wellslager et al.*, 140.
7. **Office of**—The only purpose of an assignment of errors in an action heard in equity is to point out the errors of law. Such errors seem to be limited to rulings affecting the pleadings or

PRAC. SUP. CT. Continued

- decree; *e. g.*, if the decree is contrary to a finding of facts or where the pleadings do not warrant the relief granted.—*Idem.*
8. **Rulings on Evidence**—An assignment of errors is not necessary in an action heard in equity in the case of erroneous rulings on the admission of evidence, as they can only be determined on trial *de novo*.—*Idem.*
 9. **Judgment on Pleadings**—An assignment of error is not required in an action heard in equity where judgment is rendered on the pleadings.—*Idem.*
 10. **Motions and Demurrers**—A ruling on a motion or demurrer in an action heard in equity can only be brought to the attention of the supreme court on error assigned.—*Idem.*
 11. **Attorney**—Service of a notice of appeal upon the attorney who originally appeared for plaintiff and who continued to act in the case for many years and whose appearance as attorney, does not appear, from the record, to ever have been withdrawn is sufficient, under Code, 1873, section 3178, providing that the notice of appeal may be served on the adverse party or his "attorney who appeared for him in the court below" though he had ceased to act as attorney in the case, when served with notice.—*American Emigrant Co. v. Long*, 194.
 12. **STIPULATIONS**—An agreement of the respective, attorneys employed in several suits involving the same issues, entered into after appeals had been taken therefrom, stipulating that the appeals had in fact been taken and perfected, and that all the evidence in each was certified to, and made a part of the record by the trial judge, was binding on the respective parties on appeal.—*Idem.*
 13. **Bill of Exceptions**—A bill of exceptions stated that on the trial the court gave to the jury "instructions numbered one to —inclusive," which were all the instructions given in the cause and that to the giving of each of which, "except Nos. one to the last one given," plaintiff duly excepted to at the time, will not be held insufficient on the ground that it appears therefrom that none of the instructions were excepted to, as it is obvious that the word "except" was erroneously inserted.—*First National Bank v. Robinson*, 463.
 14. **TIME OF FILING**—A bill of exceptions filed March 31st, is filed in time where the verdict was rendered the preceding December 21, and a motion for new trial was filed December 14th, and submitted January 4th, and overruled March 7th, at which time the court by consent of the parties allowed sixty days to.

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prepare and file the bill of exceptions. Time so given is computed from the date of making the order and not with reference to the term at which the case was tried.—*Horse Importing Co. v. Novak*, 157.

Change of Venue—See ¹⁹, *post*.

Correction of Record—See ⁴⁶, *post*.

15. **Costs**—The cost of an additional abstract filed by appellee will be taxed to him where it merely presents matter about which there is no question, though the amendment was not stricken from the files, on motion.—*Fox v. Gray*, 433.

Directed Verdict—See ³⁹, *post*.

Equity—See ⁶, ⁷, ⁸, *ante*.

Estoppel—See ³⁸, *post*.

Evidence—See ³⁰ to ³⁸, *post*.

16. **Final Judgment**—An order sustaining a motion in arrest of judgment filed by one guilty of embezzlement and ordering him to be held to appear before the next grand jury is a final judgment from which the state may appeal.—*State v. Alverson*, 152.

Harmless Error—See ³⁹, ³⁹ to ⁴⁰, *post*.

Instructions—See ³⁹, ³⁹, *post*.

Judgment on Pleading—See ⁹, *ante*.

Misconduct—See ⁴⁰, ⁴¹, *post*.

Motion and Demurrer—See *ante*, ¹⁰.

New Trial—See ⁴², ⁴³, *post*.

Nominal Damages—See ¹⁸, *post*.

Notice—See ¹¹, *ante*.

Objections—See ⁴¹ to ⁴³, *post*.

Presumptions—See ³³, ⁴¹, *post*.

Record Below—See ⁵² to ⁵⁷, *post*.

Reporter—See ⁶⁰, ⁶¹, ⁶², *post*.

17. **Review**—CHANGE OF VENUE—Refusal of an application for a change of place of trial, on which the affidavits were in conflict, on the ground of the prejudice of the people of the county against the defendant, as shown by comments in newspapers, will not be disturbed on appeal where it appears that such comments were designed for political effect rather than otherwise, and that there was no abuse of discretion.—*Alverson & Hamilton v. Insurance Co*, 60.

18. **EVIDENCE**—*Abstract*—Where appellant's abstract does not contain all the evidence, and appellee files an abstract setting out evidence which it claimed was omitted by appellant, and does

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PRAC. SUP. CT. Continued

- not deny that both abstracts contain all the evidence, the court will presume that all the evidence is before it.—*First National Bank v. Robinson*, 463.
19. *Same*.—Where it is not shown that appellant's abstract contains all the evidence, the judgment may be affirmed, but the appeal cannot be dismissed.—*Idem*.
 20. *Admission and Exclusion*.—Refusal to permit an answer to a question whether a certificate of warranty was given with a certain horse on its sale, is not ground for reversal, as it would not be competent by an answer to such question to prove the character of the instrument given.—*Elwood v. McDill*, 437.
 21. *Same*.—Alleged error in admitting or excluding evidence cannot be considered on appeal where the evidence is not in the record.—*Sloan v. Davies, Kech, et al*, 97.
 22. *Conflict*.—In a prosecution for seduction, where prosecutrix had been delivered of a child, and the evidence whether defendant had had sexual intercourse with her was conflicting, she affirming and he denying it, the verdict against him will not be disturbed.—*State of Iowa v. Hayes*, 82.
 23. *Same*.—When the evidence, though conflicting, is ample to sustain the findings and judgment of the trial court, they will not be reversed.—*Bank v. Creamery Package Mfg. Co.*, 186.
 24. *Same*.—When the evidence as to duress is conflicting, the question is for the jury.—*Salvador v. Feeley*, 478.
 25. *Same*.—A verdict on conflicting evidence, and approved by the trial judge, will not be disturbed on appeal, though it might well have been the other way.—*Childs v. Muckler*, 279.
 26. *Cross-examination*.—A conviction will not be reversed on appeal because of evidence drawn out by appellant on cross-examination and afterwards withdrawn from the jury on his motion.—*State of Iowa v. Marshall* 88.
 27. *Directed Verdict*.—Only the evidence received need be considered on appeal, in passing upon the action of the court in taking the case from the jury.—*Goring v. Fitzgerald*, 507.
 28. *Preservation*.—No question for the consideration of which the evidence is necessary can be considered on appeal where the evidence has not been so preserved that it is part of the record.—*Alverson & Hamilton v. Insurance Co.*, 60.
 29. *Rule Applied*.—In an action on a policy of insurance covering notions, groceries and hardware, and providing against

PRAC. SUP. CT. Continued

keeping of gunpowder, petroleum, coal oil and celluloid, the issues were as to the right of the insured to keep such prohibited articles for sale in certain small quantities, as he did. An instruction was given that if those prohibited articles were generally included and carried by dealers of groceries, hardware and notions, the policy would not be void. This instruction, and the admission of evidence on that issue, were assigned as error, but no part of the evidence was in the record. *Held*, that under such condition of the record, these questions could not be considered.—*Idem*.

30. *Presumptions*—If all the evidence taken in the trial of an equitable action is not before the supreme court, the rulings thereon, even if erroneous, will be presumed to have been without prejudice.—*Smith v. Wellslager, et al*, 140.
31. **HARMLESS ERROR**—A witness testified to the presence of a sack of candy in his store, where an accused worked. There was no evidence that the accused had anything to do with the candy. *Held*, that this evidence was not prejudicial —*State of Iowa v. Marshall*, 38.
32. **SAME**—The admission of immaterial evidence is not ground for reversal unless it reasonably appear that it was prejudicial to the complaining party.—*Childs v. Muckler*, 279.
33. **TRIVIAL ERRORS**—Trivial errors in the admission or rejection of evidence will not work a reversal, where the controlling facts are so fully established as to leave no question of the justice of the verdict.—*Harward v. Davenport*, 592.
34. **CURING ERROR**—Error in admitting evidence is cured by withdrawing it from the jury, by instructions.—*Boyce v. Allen*, 249.
35. *Same*—It is not prejudicial error for the court, in its charge to state that one was in possession of property at the time of levy, where the evidence showed that he was in sole charge, and the jury were instructed as to the effect of such possession in case it should be found that he was only an employee.—*Frank v. Davenport*, 588.
36. **INSTRUCTIONS**—The appellate court will consider the instructions complained of, in connection with the charge as a whole.—*Frank v. Davenport*, 588.
37. *Same*—Defendant is not prejudiced by an instruction which requires the state to prove more than the law requires.—*State v. Chingren*, 169.

PRAC. SUP. CT. Continued

38. **MISCONDUCT OF COUNSEL—Waiver**—The failure of the appellant to call the trial court's attention to the conduct of the counsel in presenting the case to the jury justifies the supreme court in refusing to grant any relief on that ground.—*Frank v. Davenport*, 588.
39. **Affidavits**—Misconduct of an attorney in presenting a case to the jury which occurs in the presence of the court cannot be shown on appeal by affidavits.—*Idem*.
40. **NEW TRIAL**—An order granting new trial will not be set aside on appeal, unless it affirmatively appears that the discretion of the court has been abused.—*Moore & Co. v. Horton*, 376.
41. **Trial to Court**—In a trial by the court the controlling question is the sufficiency of the evidence, and the judgment is a direct ruling upon that question. Hence, the sufficiency of the evidence may be reviewed on appeal, though no motion for new trial was made.—*Checkrower Co. v. Bradley & Co.*, 587.
42. **OBJECTIONS BELOW**—Advantage cannot be taken on appeal, of an objection that the evidence was insufficient to sustain an allowance for damages, to which the attention of the trial court has not been called.—*Sisson v. Kaper*, 599.
43. **SAME**—In replevin an objection that the complaint does not allege that the property replevined was wrongfully detained by the defendant, is waived by a failure to object in the trial court.—*Kennedy v. Roberts*, 521.
44. **SAME**—Plaintiff had a verdict but appealed from a refusal to allow him to amend after verdict and from a reduction of his verdict. Held, errors assigned on matters occurring in the course of trial not brought to the attention of the court below by application for new trial, or otherwise, cannot be reviewed.—*Ankrum v. City of Marshalltown*, 498.
45. **SAME**—Where a trial was had on an indictment alleging facts which were immaterial, and the jury was instructed to consider such facts, the case will be reviewed, although no objection to the testimony was made in the court below.—*State v. Nine*, 131.
46. **SAME**—A motion by plaintiff for a judgment against both defendants upon the referee's finding that the female defendant signed the note in suit and the mortgage securing the same for the sole purpose of relinquishing her dower interest is sufficient to save for the purposes of appeal, the objection that her answer averring that she signed only for such

PRAC. SUP. CT. Continued

- purpose but which did not plead fraud or mistake or ask reformation was insufficient.—Wood v. Dunham, 701.
47. *Same*—Plaintiff cannot urge for the first time on appeal that the defendant's answer did not constitute a defense where it was treated as sufficient by both parties in the court below notwithstanding Acts Twenty-fifth General Assembly which provides that no pleading shall be held sufficient on account of failure to demur thereto; and strikes from Code, 1873, section 2650, the provision that if no objection is taken to a pleading it shall be deemed waived.—*Idem*
48. **WRONG FORUM**—*New Objections on Appeal*—A defendant urging in the trial court that plaintiff was not entitled to an injunction may, on appeal, first urge that plaintiff had an adequate remedy at law. Such objection, in effect, urges a want of power rather than a mistake as to *forum*.—McLachlan v. Town of Gray, 259.
49. **PRESUMPTIONS**—It will be presumed in support of a decree foreclosing a mechanic's lien, that the evidence warranted the conclusion of the court that some of the material was furnished within the statutory period before the commencement of the action, although the statement of account attached to the affidavit for a mechanic's lien as required by Code, section 3692, shows a date beyond the statutory period as that on which the last item of material was furnished.—Johnson v. Otto, 605.
50. *Record Below*—**HABEAS CORPUS**—A claim on *habeas corpus*, as to a crime charged to have been committed on the boundary line of two counties, that crime charged against the petitioner in one county was different from the crime charged in the indictment against him in another county cannot be considered on an appeal by him from the judgment in the *habeas corpus* proceedings, where the petition recites that the charge in each case was for the same offense and there is nothing to contradict such recital except a transcript which cannot be considered.—Carter v. Barlow, 78.
51. *SAME*—An amended abstract filed by the appellee in an appeal from a judgment in *habeas corpus* proceedings by one who sets up that he is illegally restrained under an indictment found in one county, because a court having concurrent jurisdiction had previously acquired jurisdiction, which purports to contain a transcript of the proceedings of the latter county, showing a dismissal of the case in such county the day the *habeas corpus* proceeding was heard, cannot be considered where the case was decided on a demurrer to the petition, as such transcript was not before the trial court at the time of the hearing.—*Idem*.

PRAC. SUP. CT. Continued

52. **SAME**—An amended abstract setting out a copy of the indictment returned by the grand jury against the petitioner in *habeas corpus* proceedings is properly before the court on appeal from the judgment in such proceedings, where it was made a part of the petition by reference and was considered by the trial court.—*Idem*.
53. **CORRECTION**—The ruling of the trial court in denying a motion to correct the record so as to show that the extension of the shorthand notes was properly certified by the judge and the reporter cannot be reviewed by the supreme court where the motion was heard on affidavits and oral testimony taken in open court, and the evidence is not before the supreme court.—*Sloane & Davies v. Kech, et al*, 97.
54. **OFFERS AND RULINGS**—Statements in the abstracts on appeal, in the nature of conclusions as to what took place on the trial as to offers and rulings on evidence will not be considered where the record is entirely silent in regard thereto.—*Alverson & Hamilton v. Insurance Co.*, 60.
55. **SUCCESSIVE ACTIONS—APPEAL—REVIEW**—The action of the trial court in dismissing an action on a note, from which no appeal is taken, cannot be considered on appeal from a judgment sustaining a demurrer to the petition in a second suit on the same cause of action, which second suit is claimed to be a continuation of the first, within section 2537 of the Code of 1873.—*Conley v. Dugan*, 205.
56. **Rules**—The fact that a paper filed in the supreme court is printed in type larger than is prescribed by the court rules is not ground for striking it from the files, when the difference is so slight that it is not easy to say whether the rule has been violated.—*Ankrum v. City of Marshalltown*, 493.
57. **Reversal—ACCOUNT STATED**—On appeal from a judgment decreeing that defendant is absolute owner of certain land, in an action by plaintiff to have a deed absolute on its face declared a mortgage, the supreme court may, where it decides that plaintiff has a right to redeem, and is unable from the record to state the account correctly and specifically, state such account as far as possible and then remand the cause for further action by the trial court.—*Haggerty v. Brower*, 395.
58. **NOMINAL DAMAGES**—A judgment will not be reversed because of failure to allow nominal damages.—*Boardman v. Grocery Co.*, 445.
59. **WAIVER OF**—A motion to modify and waive the rules in regard to certification of the evidence in an equitable action, under

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PRAC. SUP. CT. Continued

supreme court rule, section 90, providing that when by reason of peculiar circumstances the rules relating to the abstract, preparation and argument of causes ought to be waived or modified, such modification or waiver may be granted upon proper application, will be refused where neither the shorthand notes nor the extension thereof were ever certified by the trial judge as required by Code, 1873, section 2743. The terms of the rule do not include *Authentication*.—*Sloan v. Davies, Keck, et al.*, 97.

Stipulations—See ¹³, *ante*.

Successive Actions—See ⁴¹, *ante*.

60. **Transcript—Written Evidence**—The notes of the court stenographer are not written, within the meaning of the law. But when his notes, identifying all documentary evidence, are duly certified to by the trial judge, the transcript thereof, including the judges certificate, duly certified by the reporter, may become written evidence.—*Smith v. Wellslager, et al.*, 140.
61. **TRIAL DE NOVO**—To secure a trial *de novo*, however, a transcript of the evidence must be on file within six months from rendition of final decree.—*Idem*.
62. **Statutes**—The amendment of the Code of 1873, section 3179, by Acts Twenty-sixth General Assembly, chapter 64, providing that the translation of the original notes of the shorthand reporter, certified by him to be correct, shall constitute a part of the record, and shall be sent up in its original form, in lieu of the transcript of the evidence, is limited to said section 3179, and does not, by implication or otherwise, repeal section 2743, which requires all the evidence taken in equitable causes to be certified by the judge within the time allowed for the appeal — *Sloan v. Davies, Keck, et al.*, 97.

Trial de Novo—See ⁴¹, *ante*.

Waiver—See ⁴⁰, *ante*.

PRAYER—See PRACTICE, ¹⁹.

PRESENTMENT—See CHECKS, ³, ⁴, ⁵, ⁶; EVIDENCE, ²³.

PRESUMPTIONS—See CONTRACTS, ⁶, ⁷; CRIM. LAW, ²⁰; JURISDICTION, ³; ESTATES OF DECEDENTS, ¹³; EMINENT DOMAIN, ³, ⁴; NOTICE BY PUB.; NOTES, ¹, ²; PRAC. SUP. CT., ²⁰; TAXES, ¹⁴.

PRINCIPAL AND AGENT—See AGENCY.

PRINCIPAL AND SURETY—See BONDS, ³, ⁴, ⁵; FRAUD, ¹⁰.

PRIORITIES—See MARSHALLING ASSETS, ¹, ²; SUBROGATION.

PRIVILEGE—See LIBEL, ².

PUBLICATION—See NOTICE BY PUBLICATION.

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PUB. LANDS

TO

RAIL.

PUBLIC LANDS.

The act of congress granting swamp and overflow lands to the state, passed September 28, 1850, and accepted by the state in 1853, was a grant *in praesenti*, and the act of General Assembly 1853 vested the title in the same manner in the respective counties.—*Smith v. Miller*, 688.

PUBLIC POLICY—See **COMPOUNDING FELONY**, ¹, ².

PURCHASE PRICE LIST—See **SALES**, ³.

RAILROADS—See **DEDICATION**, ¹, ², ³, ⁴; **EVID.** ¹⁰; **PARTITION TAXES**, ⁶, ¹², ¹³, ¹⁷.

1. **Agency**—**AUTHORITY OF AGENT**—Evidence that the agent at the railroad station informed the shipper of the rates made by the general freight agent between two other stations, and told him his understanding of the time and connection of trains between those stations, is not sufficient to establish the authority of that agent to contract for the shipping of freight between those stations.—*Burgher v. Railway Co.*, 335.
2. **SAME**—Evidence that a railway employe, through whose negligence plaintiff's intestate was killed while in defendant's employ, was employed to remove ashes and fire from its engines, does not tend to prove that he was employed to move engines or that he had any implied or apparent authority to move them.—*Morby v. C. & N. W. Ry. Co.*, 46.
3. **Contracts**—A shipping contract by which the shipper agrees, in consideration of the advantage of the lower of two rates of shipment that the stock is to be loaded and unloaded and fed by the shipper or his agent, and that the company shall not be liable for any injury in loading or unloading by delay of trains except those occurring by gross negligence, is valid under Kansas act, March 6th, 1883, section 13, providing that no railway company shall be permitted, except as otherwise provided by regulation or order of the board of railway commissioners created by such act, to change or limit its common law liability as common carriers, and under an order by such board providing that where any railway company has two rates for the shipment of freight, the lower rate is to apply when the common law liability is limited, it shall be lawful for such company to change or limit its common law liability in such manner as may be specified by the terms of the contract, providing that it shall not be relieved from any liability on account of the negligence of the company.—*Burgher v. Railway Co.*, 335.

RAIL. Continued

4. **Custom**—Evidence that clinker pullers in the employment of defendant railway company did at times move engines to the knowledge of the foreman in charge of the work, and that he did not forbid them, may tend to prove that they acted by authority in so moving them, although the practice did not amount to a general custom.—*Morbey v. C. & N. W. Ry. Co.*, 46.
5. **Damages**—An owner of live stock, who undertakes to oversee transportation of such stock, and to attend to loading, unloading, feeding and watering it, cannot recover for any injury occasioned by his own fault, even though the contract does not relieve the company from liability.—*Burgher v. Railway Co.*, 335.
6. **Instructions**—Action for negligence causing the death of a railroad employe—the negligence charged was that said employe was under an engine engaged in cleaning out its ash pan, that an employe whose duties did not require him to operate engines ran one against the first engine, thus causing the death of the employe at work under it. The court instructed that contributory negligence of the decedent should not defeat a recovery if the jury found that the foreman who had charge of the work of the employe who operated the second engine without authority, knew when he got on the engine that the engine was in the hands of that employe, that it must collide with the first engine unless stopped and knew that decedent was working under said first engine, and if the foreman could, by reasonable care and diligence, have prevented the collision. The evidence showed that if the wheels of the first engine had been blocked, as they should have been, decedent, would not have been injured. *Held*. The instruction was erroneous in assuming that decedent must necessarily have been injured by an unexpected movement of the engine under which he was at work, and that the foreman knew the fact first assumed.—*Morbey v. C. & N. W. Ry. Co.*, 46.
7. **SAME**—Error in requiring defendant in an action for personal injuries to prove lack of knowledge of a given fact, the burden of proof of which rests upon plaintiff, is not cured by the fact that another instruction throws the burden of proving such fact upon plaintiff.—*Idem*.
8. **License**—**REVOCATION**—A railway company which has provided a crossing at a place where its road is crossed by a street attempted to be dedicated to the public and which has dedicated so much of the street as is used for travel cannot exclude the public from the use of the crossing after it has acquiesced in such use for more than fifteen years.—*Railway Co. v. Town of Britt*, 198.

RAIL. Continued

9. **Negligence**—A railroad company is not guilty of negligence in failing to erect any barriers around the pits used by its employes in its round-house, where it would be impossible to erect barriers and do the work about an engine which is intended to be done when the pits are used.—*McDonnell v. I. C. R'y Co.*, 459.
10. **CONTRIBUTORY NEGLIGENCE**—Plaintiff's intestate, whose occupation was that of working in the round-house of a railroad, was sent at night to another round-house, where he was killed by falling into an unguarded pit, in which he had previously worked. It appeared that all round-houses had such pits, which was known to the intestate, and that intestate had an unlighted torch with him. *Held*, to show contributory negligence.—*Idem*.
11. **SAME—Jury Question**—In an action for the death of an employe of defendant, where there is evidence that the accident occurred by the unauthorized act of another employe, that it might have been prevented by a third employe, and where the evidence did not show that decedent was necessarily negligent, a refusal to direct a verdict for defendant was proper.—*Morby v. C. & N. W. Ry. Co.*, 46.
12. **Rule Applied**—Plaintiff in an action for the death of a railroad employe, alleged to have been caused by the negligence, while operating an engine, of another employe, whose duties did not require him to operate engines, has the burden of showing that the defendant had knowledge that such employe did operate engines, where the ground of negligence set up is that the foreman in charge knew of the habits of such employe of running engines and did not prevent him from doing so.—*Idem*.
13. **Province of Jury**—The jury is not authorized to presume, in the absence of evidence to that effect, that plaintiff's intestate, for whose death while in defendant's employ suit is brought, was violating his instructions by sitting on the railroad track while cleaning out the ash pan of an engine.—*Idem*.
14. **Taxation—PRESUMPTIONS**—A tax deed to land owned by a railroad company will not be held invalid, under Code, 1873, sections 1317, 1319, on the ground that it was used exclusively for railroad purposes and assessed by the executive council of the state, merely because the land was so returned by the company, when it does not appear that it was ever assessed by the executive council, as under section 897 there is a presumption that the tax deed was based on a valid assessment, and under prior sections, the executive council is not concluded by the return of the railroad company but may reject property as not

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- | RAIL. Continued | TO | REFORMATION |
|---|----|-------------|
| coming within the provisions of such section—C., B. & Q. Ry Co. v. Kelley et al. 106. | | |
| <p>15. NAME OF OWNER—An assessment of land to the "C., B. & Q. Ry" is not sufficient to show that the land is assessed to the Chicago, Burlington & Quincy Railway Company, in the absence of proof that it was, at the time, commonly known by such abbreviation.—<i>Idem</i>.</p> | | |
| <p>RATIFICATION—See DURESS, ⁴.</p> | | |
| <p>REBUTTAL—See EVID. ¹⁰.</p> | | |

RECEIVERS.

Expenses of—Priority—The compensation and expenses of the receivership will not be deferred to payment of existing liens where the appointment of the receiver is legal, although the appointment was made without prejudice to the pre-existing liens, and the assets are insufficient to pay them and the expenses of the receivership.—Gallagher v. Gingrich, 287.

RECORDING ACT—See MORTGAGES, ¹, ⁸, ⁹; PRACTICE, ¹⁰; SALES, ¹, ².

REDEMPTIONS—See EXECUTION SALE.

1. Voluntary Payments—*Pendente Lite*—Money voluntarily paid to redeem property sold under a decree which is thereafter reversed cannot be recovered.—Weaver v. Stacey, 657.
2. RULE APPLIED—One whose property was sold under execution against another and who redeems from the sale, cannot recover the surplus arising from the sale, which was applied to a second execution, from the holder of such execution, although the sale was made pending an appeal from a decree subsequently reversed which adjudged the property subject to executions.—*Idem*.

REFORMATION.

Negligence as Bar—Where one signs a contract of guaranty, intending thereby to guarantee payment of purchases of merchandise or advances thereafter made, and the contract guaranteed all indebtedness which might then or thereafter exist or be owing, which fact he might have discovered by a careful reading of the instrument, he will be held to his contract, in the absence of fraud, as his negligence will bar him relief in equity; and this, though one party to the contract directed the other where to make erasures of clauses covering antecedent debts and said that the erasure under such direction struck out all such clauses, while, as a matter of fact, it took out but one such clause and left others in the writing.—Reid, Murdock Co. v. Bradley, 220.

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REPLEVIN

TO

SALES

RELEASE—See AGENCY, ¹¹; MORTGAGES, ¹⁰.

REMISSION—See COSTS; FINES.

RENTS—See PLEADING, ¹.**REPLEVIN**—See INSTRUCTION, ¹²; PRACTICE, ², ⁴, ²⁴.

1. **Evidence**—Although evidence in an action to recover the possession of a note, that plaintiff demanded the note before bringing the suit is irrelevant and immaterial where the note was wrongfully obtained from plaintiff, its admission is not prejudicial to defendant.—*Kennedy v. Roberts*, 521.
2. **Judgment—Scope of Action**—Under Code, 1873, section 3239, providing that the right of plaintiff in replevin in the property shall be designated by the judgment, and if he is not in possession, then it is to find the value of his right, a money judgment in plaintiff's favor for the value of the property, less the amount of the chattel mortgages to which it was subject, is proper.—*Harward v. Davenport*, 592.
3. **INTEREST**—The interest of plaintiff in the proceeds of a sale of property under execution, after the payment of mortgages held by the defendant, may be determined in an action to recover the possession of specific personal property unlawfully seized under execution, although defendant was entitled to the possession of the property when the action was commenced, by virtue of the mortgages.—*Idem*.
4. **Plea and Proof—Variance**—Under Code, 1873, section 2686, that no variance be deemed material unless it misleads the adverse party to his prejudice, and section 2729, that a party shall not be compelled to prove more than the relief asked for or a lower degree included therein, proof that a plaintiff in replevin is the owner of the property, subject to chattel mortgages in favor of third persons, is not a fatal variance from an allegation that he is the absolute and unqualified owner thereof.—*Idem*.

REPLY—See PLEADING, ⁴, ⁶, ⁷.RES AJUDICATA—See ADJUDICATION; JUDGMENTS, ⁹.RESCISION—See FRAUD, ², ³, ⁴, ⁶, ⁷, ⁸, ¹¹, ¹², ¹³, ¹⁴; PRACTICE, ⁴⁰.RETURNS—See EVIDENCE, ¹⁰.REVERSAL—See REDEMPTION, ¹, ².REVOCATION—See DEDICATION, ¹, ⁴; RAILROADS, ².RULES—SEE PRAC. SUP. CT. ²⁴, ⁴⁰.**SALES**—SEE FRAUD, ², ³, ⁴, ⁶, ⁷, ⁸, ¹¹, ¹⁴; PRACTICE, ⁴⁰.

1. **Conditional—RECORDING—Priorities**—One claiming title to property because the terms of a conditional sale by him, which

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SALES Continued

was not recorded, were not complied with, is not entitled to property so transferred as against a mortgagee who, without notice of the sale, acquired an interest in the property from the purchaser after the conditional sale, through the chattel mortgage is not properly acknowledged.—*Bank v. Creamery Package Mfg. Co.*, 136.

2. **MORTGAGE**—One who extends the time of payment of an antecedent debt, in consideration of a chattel mortgage given to him, is within the protection of Code, 1873, section 1922, providing that a conditional sale of a chattel, the title being reserved in the vendor, is not valid as against any creditor or purchaser without notice unless the agreement of sale is acknowledged and recorded.—*Idem*.
3. **Contract**—**SALE OF AGENCY**—A contract by the manufacturer of corn cutters appointing a specific person as general western agent for the exclusive sale of the corn cutter and providing for his payment of a special amount for each, subject to a discount for cash within thirty days, is a contract of sale and not of agency.—*Checkrower Co. v. Bradley & Co.*, 537.
4. **Equitable Liens**—*Innocent Purchaser*—A purchaser of real estate is not bound by an oral agreement between the seller and a third party creating an equitable lien on the property, unless his knowledge of the agreement is shown.—*Slocum v. Brown*, 209.
5. **Suit for Purchase Price**—**ESTOPPEL**—An owner of certain property agreed with a purchaser to transfer the property to him under a deed warranting against all incumbrances. The deed was to remain in escrow until the grantee had paid certain taxes which were liens on the land, and it was delivered to him upon his representation that all were paid. *Held*, that a special assessment which the grantee had not paid at the time when the deed was delivered to him, but which he subsequently paid without protest and which he did not present as a claim against the grantor's estate after the grantor's death, cannot be set up as a counter claim in an action to collect the amount due on the purchase price.—*Orr v. Moore*, 420.
6. **Warranty**—A purchaser of a horse under a warranty that if it is not as warranted it may be returned and exchanged for another horse or the purchase price be refunded, has the option to either return the horse if not as warranted, or to retain it and to recover damages caused by the breach of warranty.—*Elwood v. McDill*, 487.

SALE AND RETURN—See **CONTRACTS**, ¹¹, ¹².

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SAV. BANKS

TO

SIDEWALKS

SAVINGS BANKS.

LOANS—*Construction of Statute*—Acts Fifteenth General Assembly chapter 60, section 18, provides that the total liabilities to a savings bank for money borrowed of it shall at no time exceed twenty per cent. of the capital stock paid in. *Held*,

- a. This provision is simply a rule to govern the savings bank, and it does not make a larger loan void.
- b. A bond which agrees to indemnify such bank against the failure of a debtor to pay present and future *indebtedness*, is not within the statute. *Indebtedness* may include more than *borrowed money*.
- c. Where the debt secured by bond may be enforced against the debtor and the bond was not given for an illegal purpose, the bond may be enforced.—*Savings Bank v. Boddicker*, 548.

SCHOOLS—See EMINENT DOMAIN, ³, ⁴; EVIDENCE, ³¹; TAXES, ⁹.

SEDUCTION—See CONTRACTS, ²; CRIM. LAW, ²⁹, ³⁰, ³¹; PRACT. SUP. CT. ²².

SET OFF—See PLEADING, ¹.

SETTLEMENT—See COMPOUNDING FELONY, ²; EQUITY, ²; ESTATES OF DECED. ⁹; CONTRACTS, ².

The sending of a check payable to a creditor, to a bank, with directions to deliver the same to the creditor and to obtain his signature to an enclosed receipt, in response to a letter from a creditor that he would accept a check for a specified amount in full of his claim, without directions to send it to the bank, does not constitute a settlement where it does not appear what disposition of the check was made by the bank.—*Hart v. Accident Association*, 717.

SEVERANCE—See MUNICIPAL CORP. ¹.

SHORTHAND—See PRACTICE, ⁹.

SIDEWALKS—See NEGLIGENCE, ¹, ².

1. **Defects**—*Jury Question*—It cannot be said as a matter of law that a town is not liable for a defect in a sidewalk, consisting of a loose plank, because it contains a population of only five or six hundred people.—*Graham v. Town of Oxford*, 705.
2. **SAME**—The jury was authorized to find that plaintiff was not negligent, where it appeared that, on reaching a point where one portion of the sidewalk was lower than the other, she stepped carefully on a board on the lower portion, which slipped, throwing her to the ground, and that such accident

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occurred on a dark evening, with no lights near the defects in question.—*Idem*.

8. SAME—The question whether a defect in a sidewalk was of a character sufficient to constitute negligence on the part of the town and whether the defect had existed for such a length of time before an accident occasioned thereby that the defendant should be charged with knowledge of it are questions of fact and not of law.—*Idem*.

SPECIFIC PERFORMANCE.

EVIDENCE—*Land Contract*—Plaintiff worked for his stepfather seven years after his mother's death, and then was given possession of the land in controversy, which he held until his stepfather died, five years later. Defendant married the stepfather two years after the death of plaintiff's mother, and she testified that, just prior to the marriage, plaintiff told her the land belonged to his stepfather, but plaintiff denied this. Numerous witnesses testified that the stepfather, had declared that he had agreed to give the land to plaintiff for his services, and that he did not execute deed because defendant refused to sign it. *Held*, that plaintiff was entitled to specific performance of an oral contract to convey land.—*Mills v. McCaustland*, 187.

STATUTES—See PLEA AND PROOF, ¹¹.

STATUTE OF FRAUDS—See CONTRACTS, ⁴; EVIDENCE, ²².

STATUTE PENALTY—See INTOX. LIQUOR, ⁴.

STIPULATION—See PRAC. SUP. CT. ¹².

STOCK BOOK INSPECTION -- See DAMAGES, ⁴, ⁵, ⁶, ⁷; PRACTICE, ²², ²³.

STOCKHOLDERS—See CORPORATIONS, ⁶, ⁷, ⁸.

STREET RAILWAY—See INJUNCTION; EMINENT DOMAIN, ¹, ².

STRIKING OFF—See PLEADING, ⁹, ¹⁰.

SUBROGATION.

PRIORITY OF CREDITORS—*Garnishment*—A bank having county funds on deposit, secured by an indemnity bond, gave the county additional security in the form of bills and notes. The bank failing, the county collected its claim from the surety by sale of his real estate on execution. No supersedeas was given and the land went to deed. The court below ordered, also, that said collaterals be turned over to the receiver of the bank. On appeal there was a reversal, and it was ordered that the notes should first be applied to pay the judgment, and that the proceeds of the real estate belonging to the bank should be used

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to reimburse the surety on the indemnity bond whose land had so been sold. A creditor of the surety subsequently levied on the same real estate, and sold it under execution. The receiver of the bank garnished the proceeds of the bills and notes in his own hands in a suit against the surety who had a claim upon the receiver for the proceeds of the land, but against which the receiver had a set-off. *Held*, that such creditor was not entitled to be subrogated to the county's lien on the collateral security, and that the receiver's garnishment, being first in time, gave him the first right thereto.—*Richards v Cowles*, 734.

SUBSTITUTION—See PRACTICE, ³⁶, ³⁷.

SUCCESSIVE SUITS—See PRAC. SUP. CT. ⁶⁶.

SUICIDE—See INSURANCE, ⁴.

SUSPENSION—See FINES.

TAXES—See—ADVERSE POSSESSION, ⁴, CO-TENANCY, ⁴, ESTATES OF DECEDENTS, ⁸, RAILROADS, ¹⁴, ¹⁵,

1. **Collateral Inheritance**—The collateral inheritance tax law (Acts Twenty-sixth General Assembly, chapter 28, section 1) provides that all property in the state which shall pass to any person other than persons exempted, shall be subject to a tax of five per cent. of its value above the sum of one thousand dollars. Other parts of the act provide that the tax is only payable on account of the property of an estate in excess of one thousand dollars, which remains "after the payment of all its debts." *Held*, that the word "person," in section 1, though importing the singular, should be extended to include the plural; that the debts referred to are the debts of the estate and not of the collateral heirs; that therefore the one thousand dollar exemption should be taken from the aggregate amount of the property which remained after the payment of the debts of the estate, and not from the share of each heir.—*In re Estate of McGhee v. State*, 9.
2. **Appraisement**—Acts Twenty-sixth General Assembly, chapter 28, section 1, relating to the collateral inheritance tax, provides that it shall be assessable on the "value" of the estate over and above one thousand dollars. In subsequent sections terms relating to the appraisement are used, such as follows: "appraised value," "actual market value," and "value" without qualification. *Held*, that the assessment should be made upon the fair market value, and not the assessed value of the property fixed for the purpose of ordinary taxation.—*Idem*.
3. **Same**—Where the state is not a party to the appraisement of an estate for the assessment of a collateral inheritance tax due to

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it, and had no notice thereof when made, the district court may order a second appraisalment on the state's application, alleging an unfair appraisalment.—*Idem*.

4. **Limitation of Actions**—The payment of taxes on land belonging to the government and not subject to taxation, under the belief that the government has parted with its rights to the land, does not prevent the running of the statute of limitations against the right to recover the taxes so paid, under Code, 1873, section 2530, providing that in actions for relief on the ground of "mistake," the cause of action shall not be deemed to have accrued until the mistake has been discovered.—*Lonsdale v. Carroll County*, 452.
5. **SAME**—A mistake inducing the purchase at a tax sale of land on which no taxes are due does not, where such mistake is not a ground for relief of the purchaser, stay the operation of the statute of limitations, under Code, 1873, section 2530, providing that in actions for relief on the ground of mistake, the cause of action shall not be deemed to have accrued until the mistake is discovered.—*Idem*.
6. **NOTICE TO REDEEM**—The statute of limitations does not begin to run in favor of the grantee in a tax deed of land, where the deed was issued without serving notice on the person in whose name the land was taxed or on the person in possession of the land.—*C., B. & Q. Ry. Co. v. Kelley, et al.*, 107.
7. **Mistake**—A mistake of the auditor in including in the tax list sent by him to the treasurer land which is not subject to taxation, as a result of which the land is sold, is not within Code, 1873, section 899, providing that when, by mistake or by wrongful act of the "treasurer," land has been sold on which no tax was due, the county shall hold the purchaser harmless by paying him the amount of principal, interest and costs to which he would have been entitled if the land had been rightfully sold, and the "treasurer" and his bondsmen will be liable on his official bond.—*Lonsdale v. Carroll County*, 452.
8. **SAME**—Taxes paid by a purchaser of land at a tax sale after the purchase are not within Code, 1873, section 899, providing that when by mistake or wrongful act of the "treasurer" land has been sold on which no tax was due at the time, the county is to hold the purchaser harmless by paying the amount of the principal and interest and costs to which he would have been entitled if the land had been rightfully sold.—*Idem*.
9. **Tax Sale**—Under chapter 101, Acts, Seventeenth General Assembly, providing that all lands exempted from taxation, including

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lands of any school district shall not be affected by any sale for taxes, nor shall such sale or any conveyance thereof affect or prejudice the public right therein or confer any adverse title or interest on the purchaser, a school site cannot be sold for taxes, or title by tax sale acquired thereto, though the lien of the taxes attach before the acquisition of the property for school purposes.—*District of Oakland v. Hewitt*, 668.

10. NOTICE TO REDEEM—Code, 1873, section 894, provides that a notice that a sale of land for taxes has been made, and that, unless redemption is made within a certain time, a deed will be made, shall be published as in case of non-residents, and that service shall be deemed completed when an affidavit of the service of such notice, and of the particular mode thereof, duly signed and verified by the holder of the certificate of purchase, his agent or attorney, shall be filed with the treasurer authorized to execute the tax deed. *Held*, that where an affidavit of service, made by the attorney of the purchaser, duly filed, made the affidavit of the newspaper publishers, which alleged facts required for a valid publication, and showed that the publication was duly made a part thereof, it was sufficient.—*Funson v. Bradt*, 471.
11. SAME—A description in the notice required by Code, 1873, section 894, of the expiration of the time for redemption of land sold for taxes stated the "west $\frac{1}{4}$ of the southwest $\frac{1}{4}$ of section 1" etc., had been sold instead of an undivided one-half of the land. *Held*, that though the description was not entirely accurate, yet, as it described accurately the entire tract for the taxes on which an undivided half had been sold, it was sufficient.—*Idem*.
12. SAME—One in actual occupancy of part of a lot of land and holding the title to all of it must, under Code, 1873, section 894, be served with notice before a tax deed to the land can be executed.—*C. B. & Q. R'y Co. v. Kelley et al.* 106.
13. SAME—That the assignee of a certificate of a sale of land for taxes takes possession of part of the land and begins quarrying therefrom does not deprive the owner of the land, who is in actual occupancy of another part, of his possession of said part, nor relieve the former of the necessity of notifying such owner, under Code, 1873, section 894, before obtaining a tax deed to the land.—*Idem*.
14. Affidavits—An affidavit of service of notice of the expiration of the time to redeem from a tax sale signed by the sheriff is insufficient under the statute where it does not show that that the sheriff was the agent or the attorney of the purchaser.—*Funson v. Bradt*, 471.

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15. *Same*—An affidavit of the attorney of the purchaser of land at a tax sale stating that notice of expiration of the time of redemption was served by the sheriff on specified persons and that such persons were the parties in possession of the land described in the notice, is insufficient under the statute, as it does not show that the attorney served the notice.—*Idem*.
16. *PRESUMPTIONS*—It will be presumed in favor of a tax deed, where it does not appear that notice of the expiration of redemption was served on the person in possession of the land, that no such service was required, in the absence of anything to show that any persons were in possession.—*Idem*.
17. *Redemption*—The owner of land having tendered the amount paid by a purchaser at a tax sale, with interest and penalties, will be required to pay the same in order to redeem, though the tax deed is set aside as void.—*C., B. & Q. R'y Co. v. Kelley et al.* 106.

TENDER—See DAMAGES, ⁷; FRAUD, ¹³; PRACTICE, ²³; WARRANTY, ⁶.

TIME—See CRIM. LAW, ³¹.

TRANSCRIPTS—See PRACT. SUP. CT., ⁶⁰, ⁶¹, ⁶².

TRANSFER—See ESTATES OF DECEDENTS, ⁴; PRACTICE, ⁴, ²⁸, ²⁹.

TRIAL—See CRIM. LAW, ³².

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VACANCY—See INSURANCE, ⁹.

VACATION—See HIGHWAYS; JUDGMENTS, ¹⁰, ¹³.

VALUES—See EVID. ⁴.

VARIANCE—See CRIM LAW, ¹⁶, ¹⁷, REPLEVIN, ⁴.

VENDORS LIEN—See FRAUD, ¹⁴, PRACTICE, ⁴⁰.

VERDICT—See. DIRECTED VERDICT.

WAIVER—See ADJUDICATION; MECHANICS LIEN, ⁴; PRACTICE, ¹, ⁴, ²⁷; PRACT. SUP. CT. ⁵³, ⁵⁹.

WARRANTY—See AGENCY, ⁴, ⁵; EVID. ¹⁶; DAMAGES, ⁸, ⁹; INTEREST; SALES, ⁶.

1. *Breach—Evidence*—Evidence that corn cutters purchased by a general agent for the sale thereof were returned by purchasers from him because they would not do the work intended and that because of the defects therein such agent was unable to sell the same, is admissible as tending to show the breach of a warranty that they were well made and finished, although it is not conclusive as to such breach.—*Checkrower Co. v. Bradley & Co.*, 587.
2. *Implied Warranty*—A warranty that corn cutters are fit for the purpose for which they are intended will be implied, if not

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expressed, where the sale is made under a warranty that they are "well made and finished."--*Idem*.

3. **INSTRUCTION CONSTRUED—Implied Warranty**—In an action to recover the price of a stallion, an instruction that if defendant purchased said horse for breeding purposes, which was known to plaintiff, and the horse was not suitable for that purpose, then there would be a partial failure of consideration, and, if so, the jury would have to determine how much less he was worth by reason of such failure, submits to the jury in effect, the question of implied warranty.—*Horse Importing Co. v. Novak*, 157.
4. **Pleading**—A counter-claim setting up the purchase and receipt of certain machines under a warranty, the breach of the warranty, that relying on the contracts defendants incurred certain expenses, that by the breach he was deprived of a specific profit which he would have made on a resale of the machine, and that he is damaged in a specified amount,—does not state a cause of action.—*Checkbrower Co. v. Bradley & Co.*, 587.
5. **Sale**—A representation on the sale of a stallion that if it is kept in healthy and proper breeding condition by careful and judicial handling, and does not prove to get a reasonable number of mares bred to him in foal, the purchaser may return him in good health and condition and get instead another horse of equal value, is, in legal effect, a warranty of average breeding qualities.—*First National Bank v. Robinson*, 463.
6. **Tender**—A tender back of machines purchased under a warranty for breach of such warranty must be made within a reasonable time.—*Checkrower Co. v. Bradley & Co.*, 537.

WATERS—See MUNICIPAL CORP. 2.

Accretions—A purchaser of public lands bounded by a river is not entitled to the land added thereto by a change in the course of the river and not formed by accretion.—*Smith v. Miller*, 688.

WELLS—See MECHANICS LIENS, 14.

WILLS—See ELECTION OF REMEDIES.

1. **Advancements**—The doctrine of advancements applies only to intestate estates and not to bequests or devises.—*McCormick v. Hanks*, 639.
2. **RULE APPLIED**—Money paid by a testator to a devisee before the making of the will, and which is not mentioned therein, will be considered as a gift.—*Idem*.

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3. **Evidence—Signature to Will**—Evidence by an attorney who had charge of the papers of a deceased testator that at the latter's request he showed him a will, and that testator, after looking it over carefully and examining the signatures, pronounced it his will, is competent and relevant on a contest of the will, where the subscribing witnesses are dead.—*Scott v. Hawk*, 467.
4. **Execution of Wills**—On a contest of a will, evidence that the decedent, on being shown the instrument propounded as his will, and after examination of the signatures thereto declared it to be his will, is convincing evidence of its execution by him.—*Idem*.

WITNESS—See CRIM. LAW, ¹², ¹⁹, ²⁰, ²¹; EVIDENCE, ⁹, ¹⁰; PRACTICE, ²².

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